No. 92-2046

Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1993

Republican Party of North Carolina, *et al.*,
Respondents,

v.

James B. Hunt, Jr., Governor of North Carolina, *et al.*,
Petitioners,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Should *Davis v. Bandemer's* holding that a claim of partisan political gerrymandering involving the election of legislators is justiciable be extended to a claim involving a state's method of electing its judges?

2. Are there judicially discoverable and manageable standards for adjudicating a claim that the statewide election of judges is a partisan political "gerrymander" in violation of the Fourteenth Amendment?

3. Can a court resolve a political gerrymandering challenge to the statewide election of judges without making initial policy decisions of a type that the judiciary cannot and should not make?

4. Does the Fourteenth Amendment's prohibition of partisan political gerrymanders override a state's fundamental decisions about the organization of its judiciary?

5. Is *Bandemer's* threshold test for showing degradation of a minority political group's influence on the political process as a whole satisfied by allegations of electoral defeat limited to the particular electoral process under review?

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LIST OF PARTIES

The individual petitioners before this Court were named in their official capacities in the proceedings below and have been substituted as directed by Fed. R. App. P. 43(c). These petitioners are James B. Hunt, Jr., Governor of North Carolina; William A. Marsh, Jr., Chairman of the North Carolina State Board of Elections; and Board of Elections members Ruth Turner O'Bryan; June K. Youngblood; Gregg O. Allen; and M. H. Hood Ellis. The North Carolina State Board of Elections was also an original party and joins in this petition. The Durham County Board of Elections, Forsyth County Board of Elections and Guilford County Board of Elections were original parties but were not parties to the appeal to the Fourth Circuit and are not named as parties herein. The North Carolina Association of Black Lawyers is an intervenor-defendant and was a party to the appeal to the Fourth Circuit. It does not join in this petition.

The respondents before this Court are the Republican Party of North Carolina; Bruce Briggs; William R. Sigmon; Marvin K. Gray; R. Howard Riddle; Lloyd Fowler; Joe R. Wilson; R. Walter White; Edgar A. Readling, Jr.; Frederic M. Gallagher; and Ralph A. Walker.

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v.

James B. Hunt, Jr., Governor of North Carolina, *et al.*,
Petitioners,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Defendants/Appellees, the Governor and other officials of the State of North Carolina, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals panel is reported at 980 F.2d 943 (4th Cir. 1992), and is reprinted at pages 1a-40a of the appendix to this petition. The order of the court of appeals *in banc* denying the state appellees' petition for a rehearing, and Circuit Judge Phillips's dissent from that decision, are reported at --- F.2d ---, 1993 WL 129660

(April 27, 1993), and are reprinted at pages 85a-106a of the appendix. The district court's orders dismissing the complaint and denying the plaintiffs' Rule 60(b) motion are unreported. They are reprinted at pages 41a-74a and 75a-83a of the appendix.[1]

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1992. The court denied rehearing and rehearing *in banc* on April 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves the lawfulness of decisions by the citizens of North Carolina regarding the structure of their judicial system, specifically their decision to provide for the statewide election of their principal trial judges, the judges of the superior court.[2] Since 1868 the North Carolina Constitution has required the election of superior court judges and has authorized the General Assembly to provide for their election on either a statewide or district basis. N.C.

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[1] Additional references to the reprinted materials contained in the appendix to this petition will be indicated as "App. ___."

[2] Superior court judges have "exclusive, original jurisdiction" for the trial of all felonies, N.C. Gen. Stat. § 7A-271-72, and have jurisdiction for the trial of all civil actions in which the amount in controversy exceeds ten thousand dollars ($10,000), N.C. Gen. Stat. § 7A-243.

Const. art. IV, § 16 (App. 110a-111a).[3] Since 1877, the General Assembly has provided for the statewide election of superior court judges. N.C. Gen. Stat. § 163-1 (current provision). Since 1915, when the General Assembly adopted a primary system for political parties to nominate their candidates, the nomination of candidates for statewide election as superior court judges has been by primaries held in local judicial districts. N.C. Gen. Stat. § 163-104 *et seq.* (current provisions). Thus, the major features of the electoral system at issue in this action -- nomination of superior court judges by district primary and election by statewide vote -- have been in place for more than three-quarters of a century.[4]

The decision to provide for the election of superior court judges on a statewide basis is entirely rational. Superior court judges are statewide officials by constitutional definition as well as the authority conferred upon them. Under the Constitution, they have "original general jurisdiction throughout the State" and are required to ride circuit over a wider territory than their districts of residence. N.C. Const. art. IV, §§ 12(3) and 11 (App. 109a, 110a). Likewise, the decision to provide for the nomination of superior

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[3] This same constitutional provision requires the election of justices of the supreme court and judges of the court of appeals on a statewide basis.

[4] In 1972 this Court affirmed North Carolina's long-standing practice of nominating superior court judges at district primaries and electing them on a statewide basis against an equal protection challenge. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971) (three-judge court), *aff. mem.*, 409 U.S. 807 (1972).

court judges at district primaries is entirely rational. In addition to their statewide duties, superior court judges also exercise certain statutory powers within their individual districts; these strictly local powers, for the most part, concern the appointment and supervision of local court personnel.[5]

This action was instituted on November 4, 1987. The complaint alleged that various aspects of the state's method of electing superior court judges violate the First and Fourteenth Amendments to the United States Constitution.[6] Essentially, the Republican Party of North Carolina, which has been successful in statewide elections for such offices as governor, lieutenant governor, court of appeals judge and United States senator, is alleging a claim of political gerrymandering in the statewide election of superior court judges because in modern times only one Republican has won

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[5] For example, *see* N.C. Const. art. IV, § 10 (App. 108a) (senior resident superior court judge appoints magistrates); N.C. Gen. Stat. § 7A-100(a) (fills vacancies in the office of clerk of superior court); *id.* § 7A-466(d) (appoints local public defenders).

[6] The plaintiff's complaint was precipitated by a 1987 law ("Chapter 509") imposing a district residency requirement on superior court candidates in the party primaries. Chapter 509 was enacted in large part in response to a legal action, *Alexander v. Martin*, No. 86-1048-CIV-5 (E.D.N.C. 1987), which alleged that the state's system of electing superior court judges abridged nonwhite voting strength in violation of the Voting Rights Act. Chapter 509 also eliminated staggered terms within multimember judicial districts, created new districts, and redrew existing district lines. The Supreme Court of North Carolina upheld the validity of Chapter 509 against state constitutional challenge in *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989).

statewide election to the superior court. The relief plaintiffs specifically request is an injunction mandating superior court elections by district and abolishing the district residency requirement for candidates in the district-wide primaries. The defendants moved to dismiss the complaint for failure to state a claim, Fed. R. Civ. P. 12(b)(6), and on June 7, 1991, the United States District Court for the Eastern District of North Carolina granted the motion. The district court concluded that the plaintiffs' challenge to the election of superior court judges on a statewide basis presented a non-justiciable political question. The district court held the candidate residency requirement constitutional under *Hadnott v. Amos*, 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd mem.*, 401 U.S. 968 (1971) and 405 U.S. 1035 (1972). The district court subsequently denied the plaintiffs' motion for relief from the judgment under Rule 60(b). The plaintiffs appealed the ruling on justiciability to the court of appeals, but did not appeal the decision upholding the candidate residency requirement.

On appeal, a panel of the United States Court of Appeals for the Fourth Circuit held, in pertinent part, that the plaintiffs' challenge to the statewide election of superior court judges is justiciable and that the complaint stated a valid political gerrymandering claim. By a vote of 8-3, with one judge not participating, the court of appeals denied the defendants' petition for rehearing and rehearing *in banc*. Writing for the dissenting judges in the *in banc* proceeding, Circuit Judge Phillips concluded that the district court had correctly dismissed the complaint as non-justiciable, and that even if the plaintiffs' claims were cognizable, the complaint

failed to state a claim under this Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986).

REASONS FOR GRANTING THE WRIT

This case presents fundamental questions of first impression about the authority and competence of federal courts to reshape the basic structure of a state's judiciary. The resolution of these questions will have importance far beyond the particular facts and parties of this case because they involve basic issues of federalism and federal jurisdiction that are of wide-ranging significance. This Court should grant the petition for writ of certiorari in order to settle these questions. The decision below, in addition, is squarely in conflict with every other reported decision by the lower federal courts concerning the interpretation and application of *Davis v. Bandemer*, 478 U.S. 109, a conflict that only this Court can resolve.

Relying on this Court's decision in *Davis v. Bandemer*, holding a claim of political gerrymandering in the redistricting of a state legislature to be justiciable, the court of appeals below extended the reasoning in *Bandemer* into uncharted territory by finding that a claim of political gerrymandering challenging the statewide election of judges is justiciable. This novel ruling transforms the carefully limited *Bandemer* decision into a general license to challenge state electoral systems on political "fairness" grounds, unrestrained by any established equal protection principles and unguided by any recognized and judicially manageable

standards.[7] The decision below is without any support in this Court's decisions, and indeed is contrary to the Court's caselaw interpreting the Fourteenth Amendment. This Court should grant the petition for writ of certiorari in order to correct the appeals court's misinterpretation of *Bandemer*.

The decision below also assumes that the Equal Protection Clause authorizes federal courts to redesign a state's fundamental method of self-governance, an assumption flatly contrary to the decisions of this Court. *See Gregory v. Ashcroft*, 501 U.S. ---, 111 S. Ct. 2395 (1991) (a state's choice about the structure of its judiciary and the manner of its selection is a decision of the most fundamental sort for a sovereign entity). The holding of the court below, therefore, has wide-ranging implications not only for the structure of judicial elections in North Carolina, but also for the validity of the systems of judicial elections in thirty-nine other states.[8] If the lower court's decision is allowed to

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[7] The *Bandemer* decision already has been the subject of confusion among the courts and criticism by the commentators. *See e.g.*, Schuck, "The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics," 87 Col. L. Rev. 1325 (1987) (*Bandemer* fundamentally unsound); Miller & Packman, "The Constitutionality of Political Gerrymandering - *Davis v. Bandemer* and Beyond," 4 J.L. & Politics 697 (1988) (same). This provides an additional basis for the court to grant certiorari in this case.

[8] A survey by the Conference of State Court Administrators and the National Center for State Courts reports that 40 states use some form of election process to select trial court judges, whether by regular election or retention election after appointment. Although North Carolina is

(continued...)

stand, many or all of these states face potential legal challenges to their fundamental choices about the structure of their court systems. This Court should grant the petition for a writ of certiorari in order to clarify the extent to which the Fourteenth Amendment overrides principles of federalism.

Finally, the court below has ignored the reasoning of every other federal court regarding the meaning and application of the stringent threshold test required by the *Bandemer* plurality to establish a claim of unconstitutional gerrymandering. This threshold test requires allegations of electoral arrangements that "consistently degrade [a plaintiff's] influence on the political process as a whole." *Bandemer*, 478 U.S. at 132 (emphasis added). Ignoring the evident meaning of the *Bandemer* test, as well as the decisions of other federal courts which have been summarily affirmed by this Court, the court below construed *Bandemer* to allow a claim based solely on a party's failure to win election to the particular office challenged. This Court should grant certiorari in order to resolve the conflict the decision below creates among the federal courts.

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[8](...continued)
unique in its election of trial court judges by district primaries and statewide general elections, 32 states elect at least some of their appellate judges in statewide elections, and 19 states elect at least some of their appellate judges in district or county elections. The non-statewide elections tend to be for intermediate courts of appeals, although in 6 states all appellate judges are elected by districts. In 16 states, election of some judges is by partisan elections. *See* State Court Organization 1987.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT A COMPLAINT CHALLENGING THE POLITICAL FAIRNESS OF NORTH CAROLINA'S DECISION TO ELECT SUPERIOR COURT JUDGES ON A STATEWIDE BASIS IS JUSTICIABLE UNDER *DAVIS V. BANDEMER*.

It is a fundamental principle of the law of the federal courts that the power of those courts to adjudicate disputes is limited to "justiciable" cases and controversies. From the very beginning this Court has insisted that "[q]uestions in their nature political" are not subject to judicial decision. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). The political question doctrine concerns the limits of the judicial power under Article III of the Constitution. "Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so." *Renne v. Geary*, 501 U.S. ---, 111 S. Ct. 2331, 2336 (1991).

The leading case outlining the political question doctrine is *Baker v. Carr*, 369 U.S. 186, 217 (1962), which described the doctrine as applying in cases in which there is present

> . . . a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a

> kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Applying the principles from *Baker v. Carr*, this Court held for the first time in *Davis v. Bandemer*, 478 U.S. 109, that a claim alleging a partisan political gerrymander of a state legislature did present a justiciable question of law because such a claim goes "to the adequacy of representation in state legislatures," and because judicially discoverable and manageable standards existed to resolve the claim. *Id.* at 124-25.

The court below has improperly extended *Bandemer*'s holding to a case involving neither the gerrymandering of electoral districts nor the threat gerrymandering can pose to fair representation. The decision of the court below, unlike *Bandemer*, does not draw on established equal protection principles about disputes over the purpose and effects of districting. *See id.* at 123-25. Instead, the court undertook the task of evaluating the wisdom of a state decision to elect state officials on a statewide basis. There are no recognized and judicially manageable standards to guide such an evaluation, and a decision in the plaintiffs' favor necessarily would involve making a policy decision about the appropriate

structure of the state's judicial elections. From the perspective of the federal courts, this decision involves a political question that is not susceptible to judicial resolution. This question is of such fundamental importance that this Court should grant certiorari in order to clarify the meaning and limits of *Bandemer*'s holding on the justiciability of political gerrymandering claims.

A. THE RATIONALE OF *DAVIS V. BANDEMER* DOES NOT EXTEND TO CLAIMS INVOLVING A STATE'S METHOD OF ELECTING ITS JUDGES.

The decision of the court below represents a major extension of this Court's holding in *Bandemer*, an extension that goes well beyond the rationale for the Court's holding. *Bandemer* involved the alleged partisan political gerrymandering of state legislative districts by the majority party in the legislature; in that context this Court concluded that a claim by the members of a political party that its voting power has been diluted to the point of essential exclusion from the political process as a whole by such gerrymandering is justiciable. "[T]he issue is one of representation, and we decline to hold that such claims are never justiciable." *Id.* at 124.

The decision in *Bandemer* was "expressly grounded" in the Court's concern "with the unique threat posed to truly representative government by state apportionment and districting decisions affecting the very legislative bodies that are the indispensable core of that form of government." *Republican Party of North Carolina v. Hunt*, --- F.2d ---, ---

(4th Cir. 1993) (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (App. 92a). This Court described the underlying constitutional value at stake in *Bandemer* as "the objective of fair and adequate representation," 478 U.S. at 125 n. 9. The justiciability of claims implicating this objective was demonstrated, in the Court's view, by the one person, one vote and racial gerrymandering decisions which addressed "issue[s] of fair representation" in legislative bodies. *Id.* at 123 (one person, one vote). *Accord, id.* at 124-25 (racial gerrymanders). The Court therefore rejected Justice O'Connor's argument that entertaining political gerrymandering challenges to state legislative apportionments would require the courts to make "an initial policy decision that the judiciary should not make." *Id.* at 125. *Cf. id.* at 155 (O'Connor, J., concurring in the judgment).

Bandemer thus rests squarely on the Court's conclusion that the Equal Protection Clause provides some guarantee of "the adequacy of representation in state legislatures." *Id.* at 124.[9] It was the danger of a "lack of responsiveness by those elected to the concerns" of the voters they represent that justified judicial scrutiny of the state legislative redistricting plan. *Id.* at 131-34 (plurality opinion). *Accord, id.*

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[9] Both the case law on which *Bandemer* relied, and the Court's extensive discussion of the focus on the question of fair representation, indicate that *Bandemer*'s holding applies to cases involving the apportionment of congressional seats and of local government legislative bodies. Subsequent decisions therefore have adjudicated political gerrymandering challenges to congressional redistricting plans. *See, e.g., Badham v. Eu*, 694 F. Supp. 664, 667-68 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989).

at 169-70 (Powell, J., dissenting). Because legislators ought to take their constituents' interests into account, an electoral scheme that insulates them from the influence of an identifiable political group raises justiciable questions of constitutional magnitude. The present case, in contrast, presents no question of fair representation. The plaintiffs' disagreement is with the state's mode of electing judges, the quintessentially non-representative governmental officials. Judges are not obligated to act in a politically responsive manner or to make decisions in accordance with the views of a constituency; indeed, the judicial obligation is precisely the reverse.[10] The court of appeals observed that the plaintiffs

> conced[e] that [they] have no complaint concerning the performance of superior court judges, that while elected judges are representative governmental officials, they do not represent constituents in the same sense as elected members of the legislative and executive branches, and that consequently, superior court judges could not be found to inadequately represent minority group interests. [*Republican Party of North Carolina v. Martin*, 980 F.2d 943, 958 (4th Cir. 1992) (App. 32a)]

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[10] As this Court has observed, "[i]t is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard to the views of his constituents." *Clements v. Fashing*, 457 U.S. 957, 968 (1982).

Despite these concessions, the court below concluded that *Bandemer* should nevertheless be extended to include a challenge to the statewide election of superior court judges. That conclusion is contrary to the reasoning that underlies the settled caselaw that the one person, one vote principle does not apply to judicial elections. In the leading case, *Wells v. Edwards*, 347 F. Supp. 453 (M.D.La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973), a three-judge district court concluded that

> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary. [347 F. Supp. at 455 (citation omitted).]

Wells therefore held that a claim that individual voters' right to vote is impermissibly diluted by non-equipopulous districts is not justiciable because "'[t]he State judiciary, unlike the legislature, is not the organ responsible for achieving representative government.'" *Id.* at 456 (citation omitted). This reasoning points unmistakably to the conclusion that a claim that the right to vote of a political group is impermissibly diluted by statewide judicial elections is equally non-justiciable.[11] Although this Court recently confirmed the

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[11] The dissenting judges in the rehearing proceeding in the court of appeals concluded that "[t]he first and fundamental error in our panel's decision" was its expansion of *Bandemer* beyond that decision's reason-

(continued...)

continuing authority of *Wells*, *see Chisom v. Roemer*, --- U.S. ---, 111 S. Ct. 2354, 2368 (1991),[12] the court below erroneously declined to follow *Wells*' reasoning. *Martin*, 980 F.2d at 954 (App. 22a-23a).

The authority of the judiciary in constitutional matters rests on the courts' exercise of reasoned judgment. The decision of the court below abandons the reasoning that led this Court to its decision in *Davis v. Bandemer* in order to

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[11](...continued)
ing, and cited *Wells* as "[t]he prime pointer" indicating the panel's error. *Hunt*, --- F.2d at --- (App. 90a). Judge Phillips explained:

> *Wells*' rationale for the non-justiciability of one-person, one-vote claims respecting judicial elections necessarily extends as well to the non-justiciability of group vote-dilution claims respecting such elections. I do not see how, if having one's individual vote in judicial elections denied equal weight to that of all others in the voting constituency is not the subject of a justiciable constitutional claim, having an identifiable political group's voting power in such elections "diluted" by partisan political gerrymandering could be. The one is no more nor less relevant to "preserv[ing] a truly representative government" under the *Wells* rationale. [*Id.* at --- (App. 91).]

[12] The court of appeals inexplicably treated *Chisom*, which held that § 2 of the Voting Rights Act applies to judicial elections, as limiting *Wells* to the one person, one vote context. *Martin*, 980 F.2d at 953 (App. 20a-21a). As the dissenting judges in the *in banc* proceeding observed, the panel's "reliance [on *Chisom*] is . . . simply misplaced." *Hunt*, --- F.2d at --- (App. 93a). "[T]he *Chisom* Court was at pains to disclaim any relevance of its analysis of the concededly broader reach of § 2's coverage to the reach ('justiciability') of related constitutional voting rights concerns. *Chisom*, 111 S. Ct. at 2361, 2368." *Id.* (App. 94a)

extend *Bandemer*'s conclusion to an issue plainly outside *Bandemer*'s scope. The court did so in the teeth of contrary caselaw (*Wells*) and, most tellingly, with respect to the very doctrine[13] that distinguishes those questions that are subject to the courts' exercise of judgment from those that are not. The consequence will be to transform *Bandemer* into a general invitation to litigate questions of political fairness in state electoral systems, which is the very consequence the *Bandemer* Justices were unanimously concerned to avoid. *See, e.g.*, 478 U.S. at 126; *id.* at 133-34 (plurality opinion); *id.* at 147 (O'Connor, J., concurring in the judgment); *id.* at 172-73 (Powell, J., dissenting).

B. THERE ARE NO JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS FOR ADJUDICATING A CLAIM THAT THE STATEWIDE ELECTION OF JUDGES IS AN UNCONSTITUTIONAL POLITICAL "GERRYMANDER."

One of the primary indications that a constitutional claim is a non-justiciable political question is that there is "a lack of judicially discoverable and manageable standards for resolving it." *Baker v. Carr*, 369 U.S. at 217; *United States Department of Commerce v. Montana*, --- U.S. ---, 112 S. Ct. 1415, 1424 (1992). The decision of the court of appeals

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[13] The political question doctrine identifies those cases that present issues "not amenable to judicial resolution." *United States Department of Commerce v. Montana*, --- U.S. ---, 112 S. Ct. 1415, 1424 (1992). "*[A]bstention* from judicial review" is the appropriate judicial action "in the case of a true political question." *Id.* at 1425.

below disregarded the absence of any such standards for the resolution of this case.

In concluding that manageable standards exist for deciding cases about political gerrymandering in the apportionment of state legislative seats, *Davis v. Bandemer* stressed the similarity between such cases and earlier decisions. In the racial gerrymandering cases, for example, "[t]he claim . . . was that an identifiable racial or ethnic group had an insufficient chance to elect a representative of its choice and that district lines should be redrawn to remedy this alleged defect." 478 U.S. at 124. Similarly, in *Gaffney v. Cummings*, 412 U.S. 735 (1973), "the claim was that the legislature had manipulated district lines to afford political groups in various districts an enhanced opportunity to elect legislators of their choice." 478 U.S. at 124. The possibility of making parallel inquiries into the intended effects of particular district lines on identifiable political groups, the Court believed, made *Bandemer*-type political gerrymandering cases equally susceptible to judicial resolution. *Id.* at 125.[14]

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[14] The majority that agreed on the existence of judicially manageable standards did not, however, agree on what those standards are. "As is evident from the several opinions filed today, there is no 'Court' for a standard that properly should be applied in determining whether a challenged redistricting plan is an unconstitutional partisan political gerrymander." 478 U.S. at 185 n. 25 (Powell, J., dissenting). Uncertainty about the proper standards to employ in political gerrymandering cases, and the conflict the decision below has created among the lower federal courts, are in themselves compelling reasons for this Court to grant certiorari and review the holding of the court of appeals.

In the present case, by contrast, "the equal protection standards developed and applied in the one-person, one-vote and racial vote-dilution cases" cannot be employed. *Hunt*, --- F.2d at --- (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (App. 95a).

> A unique, critical feature of contemporary group vote dilution jurisprudence (the source, per *Bandemer*, of whatever standards would be available in this case) is that the existence of a dilution-by-districting (or failure-to-district) violation can only be determined by identifying electoral districts which would not violate the group's voting rights because in those districts they would constitute effective voting majorities. . . . Critical to this process for resolving vote-dilution claims, therefore, is a court's ability to determine with sufficient precision two things: the identity of the group claiming violation of its rights -- so that its numbers, hence its potential voting strength, can be determined; and the appropriate geographical areas within which its potential voting strength so calculated is to be measured. [*Id.* at --- (App. 96a-97a).]

Judge Phillips concluded that these "interrelated proof requirements" would present "intractable" problems in the context "of a political group's vote dilution challenge to a state's design for electing judges." *Id.* at --- (App. 97a).

In this case, the identifiable political group the plaintiffs purport to represent does not consist of "registered members of one party," as was the case in *Bandemer*. *Martin*, 980 F.2d at 956 n. 23 (App. 27a). Instead, plaintiffs define the political group allegedly harmed as "not just Republicans but an indeterminate number of sometime allied non-Republican voters." *Hunt*, --- F.2d at --- (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (App. 97a). The court of appeals below concluded that such a group constituted a sufficiently "identifiable political group" to fall within *Bandemer*, and that in any event "the Republican Party of North Carolina alone would be sufficient to constitute an identifiable group." *Martin*, 980 F.2d at 956 n. 23 (App. 27a). The court's reasoning is not persuasive. As the dissenting judges in the *in banc* proceeding observed, the inclusion of non-Republican plaintiffs in the complaint was neither fortuitous nor a correctable pleading error. "The reason the group so defines itself is obvious: only so could it identify a significant number of appropriately configured judicial districts in which the group would constitute effective voting majorities." *Hunt*, --- F. 2d at --- (App. 97a). The impossibility of devising manageable judicial standards for answering the resulting question -- "how does a court determine the consistently reliable voting strength of a political party's non-party voting allies for particular electoral offices?," *id.* at --- (App. 98a), clearly identifies the plaintiffs' claim as a political question.

The basic problem of determining whether a state's decision to elect judges with statewide jurisdiction on a statewide basis should be treated as an unconstitutional

"gerrymander" is equally resistant to judicial solution. "Gerrymandering is 'the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.'" *Bandemer*, 478 U.S. at 164 (Powell, J., dissenting) (citation omitted). *See also id.* at 116-17 & n. 6 (plurality opinion) (discussing the alleged use of "familiar techniques of political gerrymandering"). In challenges to local legislative elections, "the appropriate geographical areas . . . within which to measure [plaintiffs'] voting strength," *Hunt*, --- F.2d at --- (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (App. 106a), are defined by the boundaries of the local governmental units, while in a case involving congressional or state-legislative districts, a court can resolve the controversy within the framework of representative districts ordained by constitutional provisions or by statute. In the present case, in contrast, the plaintiffs ask the courts to decide whether the Constitution prohibits a state from maintaining statewide elections for officials with statewide authority. It is obvious that electing such officials on a statewide basis may have political consequences; it is equally obvious that the propriety of doing so cannot be measured by legal standards developed to determine whether a legislature has used its powers to manipulate the size, shape or number of representatives elected in particular districts.[15] There is no judicially discoverable metric by

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[15] The plaintiffs' argument implicitly treats North Carolina's statewide election of superior court judges as analogous to at-large local government elections or to multi-member districts in which racial or political groups claim that the state has deliberately failed to create single-member districts in some of which the groups could elect candidates of

(continued...)

which a court can determine whether the desirability of attempting to make more likely the election of a certain party's judicial candidates outweighs the state's interest in the fundamental structuring of its judicial system. The claim the plaintiffs raise is, therefore, "judicially unmanageable in the ultimate sense: it cannot be resolved except by making an 'initial policy decision' -- here one concerning the basic structure of a state's judicial system -- that is 'not for judicial decision.'" *Id.* at --- (App. 99a).

C. THE COURTS CANNOT RESOLVE A POLITICAL GERRYMANDERING CHALLENGE TO THE STATEWIDE ELECTION OF JUDGES WITHOUT MAKING INITIAL POLICY DECISIONS OF A TYPE THAT THE JUDICIARY CANNOT AND SHOULD NOT MAKE.

A legal action that cannot be decided "without an initial policy determination of a kind clearly for nonjudicial discretion" is not justiciable; it is, rather, a political question which the courts cannot address on the merits. *Baker v. Carr*, 369 U.S. at 217; *United States Department of Commerce v. Montana*, 112 S. Ct. at 1424-25. The decision

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[15](...continued)
their choice. The analogy is false: the boundaries and political makeup of the states themselves, unlike those of local political units or of legislative districts, are not subject to political manipulation by legislative majorities. *Cf. Kirkpatrick v. Preisler*, 394 U.S. 526, 534 n. 4 (1969) (problem of partisan gerrymandering in congressional districting exists because "the legislature [is] free to choose which of several subdivisions, all with their own political complexion, to include in a particular congressional district").

below that the present case is justiciable transgresses this fundamental limitation on the judicial function by mandating the adjudication of a claim which cannot be resolved without determining what "the basic structure of a state's judicial system" ought to be. *Hunt*, --- F.2d at --- (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (App. 99a).

In *Davis v. Bandemer*, the Court acknowledged that adjudicating a political gerrymandering challenge to a state legislative reapportionment plan would require an "initial policy decision" about "the desirability of fair group representation." The Court denied that this rendered the case non-justiciable because "the objective of fair and adequate representation" is implicit in the Equal Protection Clause as the Court has interpreted the Clause -- in short, the Constitution itself has already made the necessary decision that the "policy" of fair representation limits the states' authority to apportion representation. 478 U.S. at 125 n. 9.

The present case, in contrast, requires for its ultimate resolution a decision about whether a state's decision to elect judges with statewide jurisdiction on a statewide basis must give way before a political group's claim that statewide elections are unfair to that group and its candidates for judicial office. Such a decision implicates the very existence of the states as self-governing political communities. *See Gregory v. Ashcroft*, 111 S. Ct. 2395. *Bandemer*'s holding that political gerrymandering challenges to legislative districting are justiciable is not in conflict with these principles: a judicial decision that a particular districting plan is unconstitutional merely would require the redrawing of

district lines and therefore would not "affect any fundamental state policy respecting the very structure of its legislative bodies." *Hunt*, --- F.2d at --- (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (App. 99a).

The plaintiffs' claim, however, is that the Equal Protection Clause requires "North Carolina [to] abandon its historic process of state-wide election of its superior court judges," *id.* at --- (App. 100a), and that the Clause empowers a federal court to order such a fundamental reconstruction of the state's judicial organization. In accepting the plaintiffs' invitation to adjudicate this action, the court of appeals has undertaken a task unsupported by precedent and well outside Article III's grant of "judicial power" to resolve cases and controversies. Statewide election of superior court judges, and the related state-constitutional requirement that the judges rotate outside their districts of residence, are "critical structural feature[s] of the state's judicial system." *Id.* The court below claimed the power to make "initial policy determinations" that are fundamentally non-judicial in character because they concern the very framework within which the people of North Carolina can and should organize their government.[16] The court should grant the petition for writ of certiorari in order to correct this overreaching.

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[16] The district court concluded that the complaint "seeks this court's intervention not in order to protect any constitutional right recognized by the Supreme Court's decisions, but in order to restructure the manner in which a state has chosen to elect a non-representative branch of government." *Republican Party v. Martin*, No. 88-263-CIV-5 (E.D.N.C. June 7, 1991) (App. 73a).

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE FOURTEENTH AMENDMENT'S PROHIBITION OF PARTISAN POLITICAL GERRYMANDERING OVERRIDES ENTIRELY A STATE'S FUNDAMENTAL DECISIONS ABOUT THE ORGANIZATION OF ITS JUDICIARY.

The decision of the court of appeals that this case is justiciable necessarily implies that the federal courts can grant effective relief if the plaintiffs prevail on the merits.[17] The only non-declaratory relief the plaintiffs currently are seeking is a mandatory injunction requiring that North Carolina conduct general elections for superior court judgeships by individual residential district. An order granting such relief would be an unprecedented assumption of a power to restructure a state's fundamental organization of its judiciary and would violate constitutional principles of federalism. Even if the court of appeals were correct in holding the case justiciable, it should have affirmed the dismissal of the complaint on the ground that the plaintiffs' claim is plainly foreclosed by this Court's federalism decisions.

North Carolina's decision to elect superior court judges on a statewide basis is "a fundamental policy choice respecting the structure of this critical trial-level component

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[17] A case in which the district court could afford the plaintiffs no relief likely to redress their supposed injury would not be justiciable because the plaintiffs would lack constitutional standing. *See, e.g., Allen v. Wright*, 468 U.S. 737, 751 (1984).

of the state's judicial system." *Hunt*, --- F.2d at --- (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (App. 100a). As this Court observed in *Gregory v. Ashcroft*, 111 S. Ct. 2395, a state's choice about the structure of its judiciary is "a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Id.* at 2400. *Gregory* itself involved the question of whether a state constitutional requirement that state judges retire at a certain age violated the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, or the Fourteenth Amendment. The Court upheld the state requirement under the Fourteenth Amendment and construed the Act not to cover state judges primarily because by doing so it could avoid the "potential constitutional problem" that a contrary interpretation would present. *Id.* at 2403. *See also id.* at 2405-06.

The potential problem *Gregory* identified and avoided arises from the fact that the Constitution protects the power of the individual states "'to prescribe the qualifications of its officers and the manner in which they shall be chosen.'" *Id.* at 2401 (citation omitted). The "authority of the people of the States" in this area "is a power reserved to the States under the Tenth Amendment and guaranteed them" by Article IV § 4. *Id.* at 2402.[18] This constitutionally protect-

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[18] The Guarantee Clause states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, § 4. The Court recently has indicated that the Clause may set justiciable limits on federal intrusion into the structure

(continued...)

ed state authority to choose its own structures of self-governance sets limits to Congress's power to "alte[r] the form or the method of functioning of [a state's] government." *New York v. United States*, --- U.S. ---, 112 S. Ct. 2408, 2433 (1992) (discussing Guarantee Clause argument). Federalism similarly conditions and limits the power of federal courts to interfere with state governmental structures. *See, e.g., Growe v. Emison*, --- U.S. ---, 113 S. Ct. 1075, 1081-83 (1993); *Rizzo v. Goode*, 423 U.S. 362, 377-80 (1976).

The many decisions enforcing the Equal Protection Clause in the area of voting rights do not contradict or override these principles of federalism. The one person, one vote and racial gerrymandering cases as well as *Davis v. Bandemer* required the states to administer their electoral systems equally, without unconstitutionally diluting the weight of particular citizens' votes;[19] they did not alter the fundamental nature of those electoral systems, as the plaintiffs ask the courts to do in the present case. The apparent belief of the court of appeals that the Equal Protection Clause requires or permits the courts to substitute their views on the appropriate organization of the state's judiciary simply ignores this Court's consistent recognition that the states'

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[18](...continued)
or functioning of state governments. *See New York v. United States*, --- U.S. ---, 112 S. Ct. 2408, 2432-33 (1992).

[19] Even when it is acting to remedy a clear constitutional violation in a state's legislative or congressional districting, considerations of federalism require a federal district court not to "'intrude upon state policy any more than necessary'" to insure compliance with the federal Constitution. *Upham v. Seamon*, 456 U.S. 37, 42 (1982).

power to structure their governments "has force even as against the proscriptions of the Fourteenth Amendment." *Gregory*, 111 S. Ct. at 2405.

The consequences of the decision below also illustrate the erroneous nature of the appeals court's understanding of the relationship between the Fourteenth Amendment and federalism. If the decision below were correct, then all decisions to elect state officials on a statewide basis would be subject to political "gerrymandering" challenges where a political group as yet unsuccessful in electing its candidates is able to allege that election by districts would secure to it electoral success.[20] The implicit conclusion of the court of appeals that such a challenge would state a claim for relief sufficient to survive a motion to dismiss reflects that court's fundamental misapplication of the substantive constitutional principles of federalism as well as of the limits on the adjudicative and remedial powers of the judiciary. The decision below assumes the Equal Protection Clause licenses federal courts to redesign a state's fundamental methods of self-governance, an assumption flatly contrary to the deci-

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[20] For the purposes of determining whether a *Bandemer* claim survives a Rule 12(b)(6) motion to dismiss, there would appear to be no difference in principle between the election of superior court judges at issue in the present case and statewide election of appellate judges, state boards, and other multi-member state bodies. Indeed, it is not clear that an action challenging the statewide election of the holders of unique offices such as the governorship properly could be dismissed for failure to state a claim under the reasoning of the court of appeals. *See Hall v. Holder*, 955 F.2d 1563, 1567 (11th Cir. 1992) (single-commissioner form of government subject to vote dilution challenge under § 2 of the Voting Rights Act), *cert. granted*, --- U.S. ---, 113 S. Ct. 1382 (1993).

sions of this Court. This Court should grant certiorari in order to review the appeals court's trivialization of the state's constitutionally protected autonomy and to clarify the extent to which the Fourteenth Amendment overrides principles of federalism.

III. THE COURT OF APPEALS' HOLDING THAT THE *BANDEMER* THRESHOLD TEST IS SATISFIED BY ALLEGATIONS OF ELECTORAL DEFEAT LIMITED TO THE PARTICULAR ELECTORAL PROCESS UNDER REVIEW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

In order to state a claim of unconstitutional political gerrymandering under the plurality opinion in *Davis v. Bandemer*, plaintiffs must make "a threshold showing of discriminatory vote dilution." 478 U.S. at 143.[21] Such a showing requires allegations of discriminatory intent, *id.* at 129, "a history (actual or projected) of disproportionate results," *id.* at 139, and electoral arrangements that "consistently degrade [the plaintiffs'] influence on the political process as a whole," *id.* at 132 (emphasis added). The third, "political process" prong is quite distinct from the requirement that plaintiffs allege a history of disproportionate results and meeting the disproportionality requirement does

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[21] The court of appeals concluded, in accordance with the other courts that have addressed the issue, that it should follow the plurality opinion's statement of the substantive standards to be applied in a political gerrymandering claim. *Martin*, 980 F. 2d at 955 n. 22 (App. 24a-25a).

not satisfy the "political process" prong: plaintiffs must allege, and ultimately present "specific supporting evidence," that "those who are elected will disregard the disproportionately underrepresented group." *Id.* at 132. The plurality's description of the threshold requirement and its conclusion that the Bandemer plaintiffs themselves had not met this stringent standard make it clear that plaintiffs state a claim only when they can allege that "a partisan political gerrymandering process ha[s] worked, or assuredly soon w[ill] work, an effective destruction of the power of the affected minority political party even to 'influence' the political processes of the state. . . . [T]he degradation of the minority political group's influence on the political process must extend to that 'process as a whole.'" *Hunt*, --- F.2d at --- (Phillips, Cir. J., dissenting from denial of rehearing *in banc*) (citing *Bandemer*, 478 U.S. at 132, 143) (App. 103a). In *Terrazas v. Slagle*, --- F. Supp. ---, 1993 WL 166437 (W.D. Tex. April 5, 1993), a three-judge district court considered the decision of the court below and expressly rejected that decision's interpretation of *Bandemer*. The *Terrazas* court concluded that the appeals court's "rather narrow view" misread *Bandemer* and that "the term 'political process as a whole' means straightforwardly all the structures of the state governmental system." *Id.* at *10.

Despite these clear indications that plaintiffs must be able to allege exclusion from the state's political life as a whole, and not simply lack of success in the particular electoral system they are challenging, the court of appeals held, in a footnote, that *Bandemer*'s references to the "political process as a whole" should be limited to "the

relevant political sphere." *Martin*, 980 F.2d at 956 n. 24 (App. 28a). The court therefore "confine[d its] analysis to evaluation of the claimed effect of the method of electing superior court judges on the political process of election of superior court judges within North Carolina." *Id.* Employing this interpretation of the *Bandemer* threshold test, the court concluded that the complaint states a claim because the plaintiffs alleged that the statewide election of superior court judges virtually precludes Republican candidates' success in seeking election to those positions and affects "the nomination and slating of [Republican] candidates" as well. *Id.* at 956-57 (App. 29a).

The decision below ignores this Court's reasoning in *Bandemer* that requires degradation of a plaintiff's influence on the political process as a whole and is squarely in conflict with every other reported decision addressing the issue. In each of those decisions, the "political process" requirement has been given its natural meaning and the courts have inquired into whether plaintiffs can claim that they have essentially been precluded from influence on the overall political life of the state.[22] In these decisions, the courts

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[22] The dissenting judges in the *in banc* proceeding noted that "[a]s the panel decision implicitly recognizes, dramatic successes in state-wide elections by the North Carolina Republican Party (and its cross-over allies) in recent years would make meeting this [political process] requirement impossible if 'as a whole' refers to the whole range of the state's political processes." *Hunt*, --- F.2d at --- (App. 102a-103a). This Court summarily affirmed a three-judge district court's decision dismissing a *Bandemer* challenge to North Carolina's congressional districts on precisely this basis. *Pope v. Blue*, 809 F. Supp. 392 (continued...)

held that the success of the plaintiffs' political party in elections other than those under consideration established their inability to meet *Bandemer*'s threshold; this Court summarily affirmed each of these decisions rejecting the interpretation of *Bandemer* adopted by the court below. *See Holloway v. Hechler*, 817 F. Supp. 617 (S.D.W.Va. 1992), *aff'd mem.*, --- U.S. ---, 113 S. Ct. 1378 (1993); *Pope v. Blue*, 809 F. Supp. 392, --- (W.D.N.C. 1992) (three-judge court), *aff'd mem.*, --- U.S. ---, 113 S. Ct. 30 (1992); *Fund for Accurate and Informed Representation v. Weprin*, 796 F. Supp. 662, 668-69 (N.D.N.Y. 1992) (three-judge court), *aff'd mem.*, --- U.S. ---, 113 S. Ct. 650 (1992); *Badham v. Eu*, 694 F. Supp. 664, 670-71 (N.D.Cal. 1988) (three-judge court), *aff'd mem.*, 488 U.S. 1024 (1989); *see also Terrazas v. Slagle*, --- F. Supp. ---, 1993 W.L. 166437 (W.D. Tex. April 5, 1993). Thus, the decision of the court below appears to be in conflict with the opinion of this Court and clearly creates a serious conflict among the lower federal courts as to the proper interpretation and application of *Bandemer*, a conflict that only this Court can resolve.

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[22](...continued)
(W.D.N.C. 1992) (three-judge court), *aff'd mem.*, --- U.S. ---, 113 S. Ct. 30 (1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS

REPUBLICAN PARTY OF NORTH CAROLINA; Bruce Briggs; William R. Sigmon; Marvin K. Gray; R. Howard Riddle; Lloyd Fowler; Joe R. Wilson; R. Walter White; Edgar A. Readling, Jr.; Frederic M. Gallagher; Ralph A. Walker,

Plaintiffs-Appellants,

v.

James G. MARTIN, Governor of North Carolina; North Carolina State Board of Elections; Robert N. Hunter, Jr., Chairman of North Carolina State Board of Elections; Thomas A. Farr; William A. Marsh, Jr.; Ruth Turner Semashko; June K. Youngblood; The North Carolina Association of Black Lawyers,

Defendants-Appellees,

and

Durham County Board of Elections; Forsyth County Board of Elections; Guilford County Board of Elections,

Defendants.

No. 91-1741.
United States Court of Appeals, Fourth Circuit.
Argued May 6, 1992.
Decided Nov. 24, 1992.
As Amended Jan. 5, 1993.

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS CONTINUED . . .

Before RUSSELL and WILKINS, Circuit Judges, and WILLIAMS, Senior United States District Judge for the Western District of Virginia, sitting by designation.

OPINION

WILKINS, Circuit Judge:

The Republican Party of North Carolina (RPNC)[1] appeals an order of the district court dismissing its suit against the North Carolina State Board of Elections (NCSBE)[2] on the ground that RPNC's complaint presents a

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[1] Appellants include the Republican Party of North Carolina, individual North Carolina voters registered as Republicans, individual North Carolina voters registered as Democrats but who regularly vote for Republican candidates for superior court judgeships, former candidates for the office of Superior Court Judge in North Carolina, one current Superior Court Judge, and one former Superior Court Judge. For ease of reference, we refer to Appellants collectively as "RPNC."

[2] Appellees joining the motion made by the North Carolina State Board of Elections include the Chairman of the North Carolina State Board of Elections, Robert N. Hunter, Jr., and various other individuals sued as officials responsible for conducting elections in the state. The North Carolina Association of Black Lawyers, a statewide organization of black lawyers and law students, successfully moved to intervene as a party defendant, *see Republican Party of N.C. v. Martin*, 865 F.2d 1259 (4th Cir. 1988) (per curiam), and joins the motion as well. Defendant James G. Martin, Governor of North Carolina, did not move or join in the motion to dismiss. However, the district court dismissed the complaint against all defendants due to the absence of a justiciable question. *See* Fed. R. Civ. P. 12(h)(3). We refer collectively to Appellees as "NCSBE."

(continued...)

nonjusticiable political question. In its complaint brought under 42 U.S.C.A. §§ 1981, 1983 (West 1981 & Supp. 1992), RPNC alleges that the method of electing superior court judges[3] in North Carolina constitutes a political gerrymander intended to deprive members of the Republican Party and others aligned with this political party of rights guaranteed by the First Amendment, U.S. Const. amend. I, and the Equal Protection Clause of the Fourteenth Amendment, *id.* at amend. XIV, § 1. We agree with RPNC that a justiciable question is presented. We further conclude that the complaint states a claim under the Fourteenth Amendment that, if proven, is one upon which relief may be granted. We find, however, that RPNC has failed to state a claim under the First Amendment. Consequently, we reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

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[2](...continued)

The original defendants also included several county boards of elections. These defendants successfully moved to dismiss early in the litigation. *Republican Party of N.C. v. Martin*, 682 F. Supp. 834 (M.D.N.C.1988) (also granting motion of remaining defendants for change of venue from the Middle District to the Eastern District of North Carolina).

[3] Superior court judges in North Carolina are trial court judges of general jurisdiction.

I.

A.

Prior to 1868, the General Assembly of North Carolina appointed all state judges. John L. Sanders, *A Brief History of the Constitutions of North Carolina, in The Constitution of the State of North Carolina: Its History and Content* 1, 1-2 (issued by Thad Eure, Secretary of State of North Carolina, 1983). Since 1868, the Constitution of North Carolina has allowed the General Assembly to choose between statewide or districtwide popular elections as the method for selecting superior court judges.[4] *See* N.C. Const. art. IV, § 16 (also noting that current provisions of this section are similar to those of the 1868 constitution as rewritten in 1962). In 1877, the General Assembly implemented the present scheme of statewide elections,[5] *see generally* N.C. Gen. Stat. § 163-1 (Michie 1991) (detailing current timing of primaries and elections), and in 1915, the legislature enacted Chapter 101, a law that includes a requirement that candidates for the office of superior court judge be nominated through party primaries, *see generally id.* § 163-104 (Michie 1991) (current provision addressing primary elections). Although Chapter 101 does not specify

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[4] The General Assembly must "divide the State into a convenient number of Superior Court judicial districts." N.C. Const. art. IV, § 9(1). The constitution further directs the legislature to organize the counties of the state into judicial divisions to encompass multiple judicial districts. *Id.* §§ 9, 11.

[5] RPNC maintains that North Carolina is the only state in which trial judges of general jurisdiction are elected by a statewide, general election.

that the local primaries be held within each district, the North Carolina State Board of Elections implemented and presently maintains a system of local districtwide primaries.[6] Consequently, voters nominate candidates for superior court judgeships in local party primaries held in each district, and thereafter, the successful primary candidates from each district run against each other in a general, statewide election. Thus, for example, in a given district, the voters select one candidate in the Democratic primary and another in the Republican primary. These candidates then run against each other to fill that superior court judgeship in a general, statewide election in which all of the voters of the state participate.

While superior court judges must "reside in the district for which [they are] elected," N.C. Const. art. IV, § 9(1), the constitution grants the judges statewide jurisdiction, *id.* § 12(3), and permits rotation from district to district within a judicial division,[7] *id.* § 11. Presently, the state is divided into four judicial divisions. *See* N.C. Gen. Stat. § 7A-41 (Michie Supp. 1991). According to RPNC's complaint, superior court judges do not actually serve throughout the state because assignment outside of a division rarely occurs, and a superior court judge exercises unique statutory powers within his or her own district. For example, the

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[6] Neither party points to statutory authority for this practice and our research has uncovered no statute directing it.

[7] Amendments to the constitution in 1868 resulted in the rotation requirement. *See* N.C. Const. art. IV, § 11 (noting that provisions of § 11 are similar to those of art. IV, § 9 of the constitution of 1868 as rewritten in 1962).

judge in each district appoints the local public defender, *id.* § 7A-466(d) (Michie Supp. 1991), and fills vacancies for the position of clerk of superior court, *id.* § 7A-100(a) (Michie 1991).

In the mid-1980's, the North Carolina Association of Black Lawyers and others brought suit against Governor Martin alleging that features of the system of electing superior court judges had the purpose and effect of abridging nonwhite voting strength in violation of the Voting Rights Act, 42 U.S.C.A. §§ 1971-74e (West 1981 & Supp. 1992), and the Fourteenth Amendment of the United States Constitution. This litigation ended by a consent decree upon adoption by the General Assembly of Chapter 509 of the North Carolina Session Laws of 1987, 1987 N.C. Sess. Laws 509 (codified at scattered sections in N.C. Gen. Stat. §§ 7A-1, *et seq.*, 163-1, *et seq.* (Michie 1991 & Supp. 1991)) (Chapter 509). *See Alexander v. Martin*, No. 86-1048-CIV-5 (E.D.N.C. Nov. 25, 1987).

Chapter 509 eliminated staggered terms within multimember judicial districts and mandated redrawing of district lines.[8] *See State ex rel. Martin v. Preston*, 325 N.C.

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[8] Subsequent to passage of Chapter 509, Governor Martin filed suit in his individual and official capacity against the State Board of Elections and numerous superior court judges claiming that the statute violated the Constitution of North Carolina because it infringed upon the right of voters to elect judges and the right of candidates to seek judicial office. *See Preston*, 385 S.E.2d at 481-82. Governor Martin further maintained that the legislation usurped his executive authority to appoint judges and that the precandidacy residency requirement unconstitutionally denied

(continued...)

438, 385 S.E.2d 473, 476-77 (1989); N.C. Gen. Stat. § 7A-41 (setting forth superior court divisions and districts). As a result, the number of judicial districts increased from 34 to approximately 70.[9] *See Preston*, 385 S.E.2d at 476; N.C. Gen. Stat. § 7A-41 (establishing new district lines). Unlike past configurations, the new district lines often split counties and some districts now consist of parts of more than one county. *See Preston*, 385 S.E.2d at 476; N.C. Gen. Stat. § 7A-41 (explaining new district boundaries). RPNC alleges that 16 districts do not have a courthouse, a clerk of court, or any other official associated with the judicial district except for the local superior court judge. In addition, Chapter 509 set forth the requirement that all individuals seeking nomination for the position of superior court judge must, at the time of filing a notice of candidacy, reside within the district for which they seek election as it will exist at the time the individual would take office. *See Preston*,

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[8](...continued)
otherwise qualified candidates the right to seek office. *See id.* at 482, 486. He did not challenge the practice of districtwide nomination followed by statewide election. The Supreme Court of North Carolina rejected Governor Martin's contentions and held that Chapter 509 comported with the state's constitution. *See id.* at 486. The court also noted that the legislature implemented the statute in order to bring the state into compliance with the Voting Rights Act and to improve the administration of justice. *See id.* at 479.

[9] RPNC contends that Chapter 509 resulted in an increase of the number of judicial districts to 70; NCSBE maintains that it increased the number to 73. This difference has no bearing on the holdings we reach, and for simplicity, we consider the state to include 70 judicial districts.

385 S.E.2d at 477; N.C. Gen. Stat. § 163-106(i) (Michie 1991) (setting forth residency requirement).

According to the allegations of RPNC's complaint, in passing Chapter 509, the General Assembly rejected amendments to eliminate the practice of nomination by primary within each district followed by a statewide general election in favor of a system by which both the primary and general elections would be held within each district. RPNC contends that this defeat marked at least the eighth attempt since 1961 to change the election method.

RPNC maintains that since 1900, in the hundreds of elections for superior court judgeships held in the state, only one Republican has been elected to a superior court judgeship.[10] (This position was eliminated several years later during redistricting.) RPNC further asserts that since 1968, four of the ten Republican candidates for superior court judgeships would have been successful if the general election had been conducted on a districtwide, rather than on a statewide, basis.

RPNC further claims that in the 1984 statewide general election, Republican candidates for superior court judgeships received approximately 46 percent of the overall vote, and Democratic candidates received approximately 54 percent of the overall vote. RPNC's complaint avers that:

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[10] In its complaint, RPNC alleged that no Republicans had been elected to a superior court judgeship since 1900. However, the parties agree that since the filing of the complaint in 1987, one Republican has been elected to the office.

> In the 24th Judicial District however, 54% of the voters who voted for Superior Court judges voted for the Republican candidate for Superior Court judge for that district and 46% voted for the Democratic candidate. Similarly, in what were then the 15A, 17B, 18, 19A, 19B, 21, 22, 23, 24, 25, 26, 27A, 28 and 29 Judicial Districts, a majority of voters who voted for Superior Court judge voted for the Republican candidates. No Republican resident Superior Court judges were elected because of the structural dilution of Republican votes by the voting customs, practices, and procedures complained of herein.

In addition, RPNC maintains that in the 1986 election, a similar disparity between the statewide election results and projected district-wide election results occurred in ten judicial districts.[11]

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[11] RPNC alleges that statewide voting statistics demonstrate that in the 1986 general election, approximately 43 percent of the electorate that voted for superior court judges voted for Republican candidates and 57 percent voted for Democratic candidates. In the Twenty-Sixth Judicial District, however, 52 percent of the district voters who voted for superior court judges voted for the Republican candidates, while 48 percent voted for the Democratic candidates. According to RPNC, a majority of voters in nine other districts voted for the Republican candidates for superior court judgeships. RPNC maintains that had a Republican candidate offered to run in these districts, and had the election been determined on a district-wide basis, Republican candidates would have prevailed in these districts. Party affiliation for 1986 remained constant from 1984: 27 percent of the voters were registered as Republicans, 69 percent as Democrats, and 4 percent were unaffiliated.

B.

RPNC challenges the custom or practice in North Carolina of selecting superior court judges by statewide popular election following local district-wide nomination. According to RPNC, this method of nomination and election contravenes the Fourteenth Amendment by diluting the votes of those who vote for Republican candidates and violates the First Amendment by restricting the rights of Republican voters to free speech and political association. The complaint also contests the validity of the requirement set forth in Chapter 509 that all individuals seeking nomination for the position of superior court judge must, at the time of filing a notice of candidacy, reside within the district for which they seek election. RPNC claims that this provision has the purpose and effect of degrading the influence of Republican voters in violation of the Fourteenth Amendment. RPNC seeks a declaration that the system used to elect superior court judges in North Carolina violates the First and Fourteenth Amendments, an injunction that prohibits NCSBE from conducting elections under the existing scheme, and an order that directs NCSBE to conduct the primary and general elections for superior court judges on a districtwide basis.

NCSBE moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[12] The district court granted the motion, holding that RPNC's

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[12] In addition, NCSBE maintained that the doctrine of legislative immunity barred the suit. The district court did not consider this defense, and NCSBE did not raise it in this appeal. Consequently, the applicability of this doctrine is not before us.

complaint raised a nonjusticiable political question.[13] RPNC appeals from this adverse ruling.

II.

Justiciability concerns "the power of the federal courts to entertain disputes, and . . . the wisdom of their doing so." *Renne v. Geary*, --- U.S. ----, ----, 111 S. Ct. 2331, 2336, 115 L. Ed. 2d 288 (1991). Accordingly, we begin our analysis by addressing whether RPNC presents a nonjusticiable political question in complaining that a political gerrymander of the method for electing superior court judges in North Carolina contravenes the First and Fourteenth Amendments.[14] In concluding that claims of vote debasement in the legislative districting context are justiciable, the Supreme Court set forth the framework for analysis of the political question doctrine in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), articulating six factors that may appear in a case raising a political question:

> Prominent on the surface of any case held to involve a political question is found a [1] textually demonstrable constitutional commit-

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[13] Although the district court purported to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), the court apparently relied primarily on the lack of a justiciable question to reach its holding. Consequently, we view Rules 12(b)(1) and 12(h) as additional authority on which the district court relied for its dismissal.

[14] We review de novo the decision of the district court to grant a dismissal for lack of a justiciable question. *See Ward v. City of Portland*, 857 F.2d 1373, 1374 (9th Cir.1988).

> ment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217, 82 S. Ct. at 710. Discovery that any one of these factors is inextricable from a controversy denotes the presence of a political question and renders it nonjusticiable. *Id.*

In *Davis v. Bandemer*, 478 U.S. 109, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986), the Supreme Court examined a claim that a state legislative apportionment scheme diluted the votes of Democrats in violation of the Equal Protection Clause of the Fourteenth Amendment. Confronted with the question of the power of the courts to entertain a claim of political gerrymandering, the Court relied on decisions in which it adjudicated claims of racial gerrymandering to conclude that a complaint of vote dilution "by a political group, rather than a racial group, does not distinguish it in terms of justiciability." *Id.* at 125, 106 S. Ct. at 2806.

Thus, the Court held that claims of political gerrymandering are justiciable.[15] *Id.* at 143, 106 S. Ct. at 2816.

Like *Bandemer*, this controversy questions whether an electoral scheme implemented by a state legislature violates,

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[15] We are cognizant of the heated debate surrounding the wisdom and reasoning of the *Bandemer* decision. *See generally Bandemer*, 478 U.S. at 144-61, 106 S. Ct. at 2816-25 (O'Connor, J., concurring in judgment) (arguing that practical concerns should render partisan gerrymandering claims nonjusticiable); *Political Gerrymandering and the Courts* (Bernard Grofman ed., 1990) [hereinafter *Political Gerrymandering*] (collecting articles expressing diverse views on *Bandemer*); Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket At Last*, 7 Sup. Ct. Rev. 175, 192 (1986) (*Bandemer* explicitly accepts the implicit holding of *Baker* that claims of political gerrymandering are justiciable.); Charles Backstrom et al., *Partisan Gerrymandering in the Post-Bandemer Era*, 4 Const. Commentary 285, 291 (1987) (arguing that *Bandemer* "establishes an important constitutional right"); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1330 (1987) (insisting that "[j]udicial regulation of partisan gerrymandering would be a cure worse than the disease"); Edward Still, *The Hunting of the Gerrymander*, 38 UCLA L. Rev. 1019, 1020 (1991) (reviewing *Political Gerrymandering* and arguing that *Bandemer* has "confounded legislators, practitioners, and academics alike" and that while "[s]ome find the case internally incoherent; others find a method to the madness"). Nonetheless, we remain bound by the decision and apply it here. We are also aware of the argument advanced by NCSBE at oral argument that had *Bandemer* come before the Supreme Court in its present composition, a contrary decision may have resulted. Perhaps, but nevertheless we are constrained to apply the edicts of the Court that we understand now exist. *See United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L. Ed. 49 (1801). The issue of justiciability of claims of political gerrymandering has been decided, and the Court has recognized that equal protection claims properly may be advanced by political groups.

by diluting votes, the right of a political party to equal protection. Consequently, *Bandemer* controls, in large part, our application of *Baker*. As in *Bandemer*, the issue presented by RPNC is the consistency of state action with the federal constitution, and thus involves no question decided, or to be decided by a branch of government coequal with the federal courts. *See id.* at 123, 106 S. Ct. at 2805-06. This controversy does not present an issue that if addressed by the courts, would cause a foreign or domestic disturbance, would express a lack of respect due to a coordinate branch of government, or would present the potential for embarrassment from multifarious pronouncements by various departments. *See id.* at 122-23, 106 S. Ct. at 2805-06. Further, the issues presented do not raise an unusual need for unquestioning adherence to a political decision already made. *See id.*

NCSBE argues that this case is distinguishable from *Bandemer* and constitutes a nonjusticiable political question because judicially discoverable and manageable standards do not exist to resolve an alleged equal protection violation in the method of electing judges, as opposed to electing legislators. NCSBE correctly points out that in determining that judicially manageable standards existed for resolution of the equal protection issues raised in *Bandemer*, the Court relied on its previous decisions addressing claims of vote dilution and violations of the one-person, one-vote rule brought by racial groups. *See id.* at 123-25, 106 S. Ct. at 2805-06; *see also White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973). The Court concluded that because those decisions and *Bandemer* involved similar questions of fair representation, judicially discoverable and

manageable standards existed for resolution of these issues. *See Bandemer*, 478 U.S. at 124, 106 S. Ct. at 2806. From these conclusions in *Bandemer*, NCSBE reasons that because superior court judges are not representative governmental officials, the issues presented here do not raise questions of fair representation on the part of the elected officials, and thus that the allegations brought by RPNC necessarily involve a nonjusticiable political question. We disagree.

RPNC alleges a claim of vote dilution under the Fourteenth Amendment much like that presented in *Bandemer*. *Baker* directs us to determine the existence of judicially discoverable and manageable standards, *Baker*, 369 U.S. at 217, 82 S. Ct. at 710, and, as *Bandemer* emphasizes, "'[j]udicial standards under the Equal Protection Clause are well developed and familiar,'" *Bandemer*, 478 U.S. at 122, 106 S. Ct. at 2805 (quoting *Baker*, 369 U.S. at 226, 82 S. Ct. at 714-15). The standards for adjudicating constitutional challenges to election schemes for legislators apply equally to challenges to election schemes for superior court judges. Both claims require a court to determine whether a state has unconstitutionally diluted voting strength by implementing and maintaining a defective election scheme. *Cf. id.* at 123-25, 106 S. Ct. at 2805-06; Bernard Grofman, *Toward a Coherent Theory of Gerrymandering: Bandemer and Thornburg* [hereinafter *Toward a Coherent Theory*], *in Political Gerrymandering* 29, 53-56 (Bernard Grofman ed., 1990) (predicting that the Court will merge racial and political gerrymandering to allow type of proof used in the former to be used in the latter). Consequently, we conclude that the standards governing other types of vote dilution claims provide judicially discernable and manageable

standards for resolution of this case. We decline to hold that standards are discoverable only when the election of legislators is involved.

NCSBE further argues that by adjudicating RPNC's claims, we shall be called upon to make an initial policy determination of a kind clearly for nonjudicial discretion because elected superior court judges are not representative governmental officials. NCSBE, however, fails to identify why the distinction between legislators and popularly-elected judges requires an initial policy determination that lies beyond our competence, nor do we perceive a reason why the distinction requires such a determination. We consider differences between the type of elected officials as pertinent to an adjudication of the merits of the claim, rather than to the justiciability of the case. *Cf. Bandemer*, 478 U.S. at 125, 106 S. Ct. at 2806 (characteristics of complaining group are relevant to merits of case, not to justiciability); *United States Dep't of Commerce v. Montana*, --- U.S. ----, ----, 112 S. Ct. 1415, 1425, 118 L. Ed. 2d 87 (1992) (noting that justiciability focuses on the power of the court to entertain an issue, not on the merits of the case). We conclude, therefore, that RPNC's claims are justiciable.

III.

Because we may affirm a judgment for any reason appearing on the record, *see McMahan v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 601*, 964 F.2d 1462, 1467 (4th Cir.1992), we next consider whether RPNC's complaint states a claim upon which relief

may be granted, *see* Fed. R. Civ. P. 12(b)(6).[16] A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses. *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (1990). Our inquiry then is limited to whether the allegations constitute "'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Bolding v. Holshouser*, 575 F.2d 461, 464 (4th Cir.) (quoting Fed. R. Civ. P. 8(a)(2)), *cert. denied*, 439 U.S. 837, 99 S. Ct. 121, 58 L. Ed. 2d 133 (1978). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957). We must assume that the allegations of the complaint are true and construe them in the light most favorable to the plaintiff. *See Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S. Ct. 1843, 1848, 23 L. Ed. 2d 404 (1969). Finally, to state a claim of vote dilution brought about by political gerrymandering under these standards, the Supreme Court requires an elevated threshold showing of an actual discriminatory effect. *See Bandemer*, 478 U.S. at 134 & n. 14, 106 S. Ct. at 2811 & n. 14.

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[16] We review a dismissal under Rule 12(b)(6) de novo. *Revene v. Charles County Comm'rs*, 882 F.2d 870, 872 (4th Cir.1989).

IV.

A.

In a broad sense, "[t]he Equal Protection Clause requires every State to govern impartially." *Karcher v. Daggett*, 462 U.S. 725, 748, 103 S. Ct. 2653, 2668, 77 L. Ed. 2d 133 (1983) (Stevens, J., concurring). The Clause "does not take from the States all power of classification." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271, 99 S. Ct. 2282, 2292, 60 L. Ed. 2d 870 (1979). Instead, "[i]t simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, --- U.S. ----, ----, 112 S. Ct. 2326, 2331, 120 L. Ed. 2d 1 (1992). Consequently, to comport with the Equal Protection Clause, classifications must relate to a proper governmental purpose and may not rest upon impermissible criteria. *Cf. id.* (noting that different treatment of newer and older homeowners under state acquisition-value assessment scheme for property taxes does not qualify for heightened review and must only rationally relate to a legitimate state interest); *Feeney*, 442 U.S. at 272, 99 S. Ct. at 2292 (noting that classifications based on race are presumptively invalid). In the context of voting rights, the Clause guarantees the electorate equality of participation in the political process by prohibiting barriers to exercise of the franchise and restrictions on access to the ballot and by ensuring the equality of votes through the forbiddance of vote dilution and unequal weighing of votes. *See* J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 Va. L. Rev. 945, 958-59 (1975).

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS CONTINUED . . .

NCSBE contends that because the goal of equal protection in the context of voting rights is fair and effective representation for all citizens, *see Reynolds v. Sims*, 377 U.S. 533, 565-66, 84 S. Ct. 1362, 1383-84, 12 L. Ed. 2d 506 (1964), the protection afforded by the Equal Protection Clause does not encompass claims of constitutional infirmities surrounding the election of judges since they are not representative governmental officials. NCSBE argues that judges do not act in a politically responsive manner or make decisions in accordance with the views of a constituency. Consequently, this argument concludes, judges cannot be considered representative governmental officials for purposes of an equal protection claim. This interpretation of the Clause, however, misconstrues the interplay between the fundamental protection of the Clause that prohibits classifications not related to a suitable governmental purpose, the goal the state seeks to advance, and the justifications offered by a state for its election scheme. To allege a prima facie equal protection violation, it is enough that a plaintiff complains of governmental treatment dissimilar to that received by others similarly situated. *Cf. Bandemer*, 478 U.S. at 127-34, 106 S. Ct. at 2807-11 (A prima facie case of political gerrymandering requires allegations of intentional discrimination, disproportionate results, and exclusion from the political process as a whole.). In order to rebut a prima facie case, a state must demonstrate adequate justifications that relate to the goal of the classification. *Cf. Reynolds*, 377 U.S. at 565, 84 S. Ct. at 1383 (noting that criteria for differentiation in weighing of votes are insufficient to justify discrimination "unless relevant to the permissible purposes of legislative apportionment"). As a result, questions pertaining to the goals and justifications offered by NCSBE for its

scheme of electing superior court judges are not presently before us because they are not relevant to whether RPNC has stated a claim upon which relief may be granted.

Even if we agreed with NCSBE that the position occupied by an elected official bears on the protection afforded by the Equal Protection Clause, we nevertheless would be compelled to conclude that the election of superior court judges in North Carolina implicates the goal of equal protection and issues of fair and effective representation. In *Chisom v. Roemer*, --- U.S. ----, ----, 111 S. Ct. 2354, 2367, 115 L. Ed. 2d 348 (1991),[17] the Supreme Court responded to the argument that elected judges are immune

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[17] In *Chisom*, the Supreme Court held that the term "representatives" describes the winners of representative, popular elections and that state supreme court judges are representatives for purposes of a claim of vote dilution under § 2 of the Voting Rights Act, 42 U.S.C.A. § 1973 (West Supp. 1992). *Chisom*, 111 S. Ct. at 2368; *see also Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, --- U.S. ----, 111 S. Ct. 2376, 115 L. Ed. 2d 379 (1991) (Section 2 is applicable to vote dilution claims regarding election of trial judges.); *cf. Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) (Preclearance requirements of § 5 of the Act apply to elections of judges.), *aff'd mem.*, 477 U.S. 901, 106 S. Ct. 3268, 91 L. Ed. 2d 559 (1986). The Act forbids imposition of a voting qualification on account of race or color that results in denial or abridgement of the right to vote. *Chisom*, --- U.S. at ----, 111 S. Ct. at 2362. We recognize that the issue presented in *Chisom* was one of statutory interpretation; yet, in addition to reliance on its interpretation of the Act, the Court engaged in a common-sense analysis of how elected judges fit into the scheme of electoral politics. *See id.* at ----, 111 S. Ct. at 2366-67; *see also* Victor J. Franckiewicz, Jr., Case Note, 38 Loy. L. Rev. 211, 222 (1992). Thus, we conclude that the analysis in *Chisom* applies to claims pursued under the Equal Protection Clause.

from public opinion because they are frequently called upon to ignore or defy popular sentiment, explaining that the state "decided to elect its judges and to compel judicial candidates to vie for popular support just as other political candidates do," and thus opted to remove judges from the shelter provided by appointment. The Court concluded:

> If executive officers, such as prosecutors, sheriffs, state attorneys general, and state treasurers, can be considered "representatives" simply because they are chosen by popular election, then the same reasoning should apply to elected judges . . . .
>
> . . . .
>
> The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office . . . . [I]t seems both reasonable and realistic to characterize the winners as representatives . . . .

Id. at ---- U.S. ----, 111 S. Ct. at 2366-67 (footnotes omitted). Even if judges are not representatives in the sense that they represent the interests of their constituents, the

electorate undoubtedly considers the broad philosophical views of candidates when voting.[18]

NCSBE maintains that *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095, 93 S. Ct. 904, 34 L. Ed. 2d 679 (1973), requires a contrary result. In Wells, the district court rejected a claim based on the one-person, one-vote doctrine applied to the election of Louisiana Supreme Court justices, reasoning that "'[j]udges do not represent people, they serve people.'"[19] *Id.* at 455

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[18] Beyond this, there also lies the very real possibility that party affiliation may reflect judicial philosophy and ultimately the outcome of judicial decisions. *See, e.g.*, Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 Am. Pol. Sci. Rev. 843, 847-49 (1961) (suggesting that study results show that "in some cases, judges rely on their personal standards of value in reaching a decision," that "these same personal standards also frequently account for their party affiliation," and that appointed judges may be more likely to vote contrary to their party pattern); Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1128 (1977) (opining that elections render state judges "vulnerable to majoritarian pressure when deciding constitutional cases") (footnote omitted); Andrew S. Marovitz, Note, *Casting a Meaningful Ballot: Applying One-Person, One-Vote to Judicial Elections Involving Racial Discrimination*, 98 Yale L.J. 1193, 1206-07 (1989) (arguing that "the amount of pressure felt by a state court judge in rendering a decision will be influenced directly by the method of judicial election utilized" and that "[j]udges elected by partisan election are most susceptible to direct pressure") (footnotes omitted).

[19] We are well aware of the numerous decisions like *Wells*, holding that a judicial office is not a representative one in the context of voting rights challenges. *See, e.g.*, *Holshouser v. Scott*, 335 F. Supp. 928, 932 (M.D.N.C. 1971) (holding that one-person, one-vote "rule does not apply

(continued...)

(quoting *Buchanan v. Rhodes*, 249 F. Supp. 860, 865 (N.D. Ohio 1960), *appeal dismissed*, 385 U.S. 3, 87 S. Ct. 33, 17 L. Ed. 2d 3 (1966)). Vote dilution and one-person, one-vote claims are distinct, and therefore *Wells* does not mandate a dismissal of a claim based on vote dilution.[20] *See Voter Info. Project, Inc. v. City of Baton Rouge*, 612 F.2d 208, 210-12 (5th Cir.1980) (recognizing distinction between claims grounded in one-person, one-vote and vote dilution in

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[19](...continued)
to the state judiciary"), *aff'd mem.*, 409 U.S. 807, 93 S. Ct. 43, 34 L. Ed. 2d 68 (1972); *League of United Latin Am. Citizens Council No. 4434 v. Clements*, 914 F.2d 620, 626 n. 9 (5th Cir. 1990) (citing cases rejecting challenges to judicial elections on various grounds), *rev'd sub nom. Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, --- U.S. ----, 111 S. Ct. 2376, 115 L. Ed. 2d 379 (1991); Edward A. Sheridan, Note, *The Equal-Population Principle: Does It Apply to Elected Judges?*, 47 Notre Dame Law. 316, 320-326 (1971) (discussing cases rejecting application of vote debasement principles to judicial elections); Marovitz, *supra* note 18, at 1199 & n. 56 (same).

[20] The Supreme Court summarily affirmed the opinion of the district court in *Wells*, and we are, of course, bound by it. The precedential effect of *Wells*, however, "extends no further than the precise issues presented and necessarily decided by those actions." *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983) (citing *Mandel v. Bradley*, 432 U.S. 173, 176 (1977)). Further, the Court may "'find it appropriate to give full consideration to a question that has been the subject of previous summary action.'" *Bandemer*, 478 U.S. at 121 (quoting *Washington v. Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979)). We believe that the questions of whether superior court judges are governmental representatives, and whether differences among elected officials bear on establishing a prima facie case of discrimination, relate to the justification offered by NCSBE for the classification rather than to whether RPNC has presented a prima facie case of discrimination.

Rule 12(b)(6) challenge to an at-large method of electing state and city judges).[21]

B.

Having rejected NCSBE's contention that the Equal Protection Clause is not implicated, we now address whether RPNC's complaint sets forth a prima facie case of vote dilution brought about by political gerrymandering.[22] In

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[21] The treatment of *Wells* by the Supreme Court in *Chisom* does not compel a different result. *See Chisom*, --- U.S. at ----, 111 S. Ct. at 2367-68. There, the state maintained that without reliance on the one-person, one-vote principle, courts could not arrive at a manageable standard to adjudicate vote dilution challenges to judicial elections. Because *Wells* foreclosed such reliance, the state's argument continued, judicial elections should be invulnerable to claims of vote dilution. *See id.*

The Court rejected this argument, emphasizing that *Chisom* did not present the question of the appropriate standard to be applied in litigation under § 2 and that, in any event, the "analysis of a proper statutory standard . . . need not rely on the one-person, one-vote constitutional rule." *Id.* at --- n. 32, 111 S. Ct. at 2368 n. 32. Thus, because the Court discussed *Wells* in the context of the standard to be applied to cases questioning the application of the one-person, one-vote rule to the election of judges, we think it is clear that the Court made no statement that *Wells* forecloses claims of vote dilution in regard to the election of judges.

[22] Although a majority of the *Bandemer* Court agreed that political gerrymandering claims are justiciable, the Court did not reach a consensus on the issue of what a plaintiff must allege, and ultimately prove, in order to prevail on a claim of vote dilution in the context of

(continued...)

order to state such a claim, a plaintiff must allege "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Bandemer*, 478 U.S. at 127, 106 S. Ct. at 2808. The effect portion of the test "requires a showing of more than a *de minimis* effect." *Id.* at 134, 106 S. Ct. at 2811. Consequently, a plaintiff must complain that an actual or projected history of disproportionate results exists, *id.* at 139, 106 S. Ct. at 2813-14, and that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole," *id.* at 132, 106 S. Ct. at 2810. The intent standard set forth in the *Bandemer* plurality opinion is easily met, and we conclude that RPNC's complaint offers sufficient allegations of intent to withstand dismissal under Rule 12(b)(6). *See id.* at 127-29 & n. 11, 106 S. Ct. at 2807-09 & n. 11; Backstrom et al., *supra* note 15, at 298 (observing that the Bandemer "plurality lowered the intent barrier essentially by presuming intent") (footnote omitted); Alfange, *supra* note 15, at 248 (same).

The complaint includes numerous specific allegations of discriminatory intent. RPNC claims that repeated efforts by Republicans to change from statewide to districtwide

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[22](...continued)
political gerrymandering. Because we believe that the plurality opinion provides the "narrowest grounds" for decision, we apply it here. *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977); *see also Republican Party of Va. v. Wilder*, 774 F. Supp. 400, 404 (W.D.Va.1991) (three-judge panel) (applying *Bandemer* plurality opinion).

elections, including proposals offered during consideration of Chapter 509, were rejected by the Democratic-controlled General Assembly, thus revealing NCSBE's intent to operate the election scheme to further discrimination against those affiliating with the Republican Party. In addition, RPNC contends that since the turn of the century only one candidate for superior court judge running on the Republican ticket has been elected and that this is a significant allegation of purposeful exclusion. Importantly, all concede that superior court judges rarely, if ever, perform judicial duties outside their respective districts and divisions, and that the majority of the voters in one part of the state vote for candidates for superior court judgeships from other parts of the state without knowing anything about the various candidates other than the candidates' party affiliation as indicated on the ballot. RPNC avers that these allegations support an inference of bad intent because they reveal NCSBE's resolve to operate an election scheme that isolates those affiliating with the Republican party regarding the election of superior court judges.

In reaching this conclusion, we reject NCSBE's contention that *Bandemer* does not bear on this issue. Pointing out that *Bandemer* addressed intent with regard to the treatment by a legislature of its own election scheme, *see Bandemer*, 478 U.S. at 128, 106 S. Ct. at 2808, NCSBE argues that because RPNC's allegations pertain to a legislatively mandated design for the election of judges, members of a separate branch of government, this controversy lacks the self-interest evident in *Bandemer*. We do not agree, however, that political considerations and party allegiance so easily separate themselves when a legislature devises a

districting scheme for another branch of government. While the self-interest may differ because it extends beyond the legislature to a coordinate branch, the controlling political party may nonetheless act to further its interests throughout the various spheres of government. Consideration of politics is inevitable in design of election schemes because of the political consequences, and we consequently perceive no distinction for purposes of assessing allegations of intent under 12(b)(6) between legislative design of election schemes for the legislature and superior court judges.[23]

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[23] NCSBE further contends that RPNC fails to satisfy the intent element because inclusion of Democrats as plaintiffs prevents RPNC from constituting an "identifiable political group." The plurality opinion in *Bandemer* provides no insight to ascertaining the confines of an acceptable group for purposes of bringing a claim of political gerrymandering. Nonetheless, we consider the inclusion of two Democrats as plaintiffs to be unobjectionable. The complaint states that these plaintiffs have and will continue to vote for Republican candidates for superior court judgeships, thus alleging a sufficient degree of cohesiveness between the Democratic and Republican plaintiffs in order to withstand a motion to dismiss. *See* Michael A. Hess, *Beyond Justiciability: Political Gerrymandering After Davis v. Bandemer*, 9 Campbell L. Rev. 207, 234 & n. 128 (1987) ("The most readily identifiable voting group is one based on political affiliation and voting patterns."); *cf. Thornburg v. Gingles*, 478 U.S. 30, 56, 106 S. Ct. 2752, 2769, 92 L. Ed. 2d 25 (1986) (Under § 2 of the Voting Rights Act, that "group members usually vote for the same candidates is one way of proving political cohesiveness" for a claim of vote dilution.). Moreover, the Republican Party of North Carolina alone would be sufficient to constitute an identifiable group. *Cf. Bandemer*, 478 U.S. 109, 106 S. Ct. 2797 (addressing political gerrymandering claim of registered members of one party).

C.

Having concluded that the complaint contains sufficient statements of intent, we turn to consideration of whether RPNC has alleged an actual discriminatory effect. The Equal Protection Clause is violated in the state political gerrymandering context "only where a history (actual or projected) of disproportionate results appears in" combination with "strong indicia of lack of political power and the denial of fair representation." *Id.* at 139, 106 S. Ct. at 2814. Thus, in order to claim an effect sufficient to state a violation of the Equal Protection Clause, RPNC must allege that the North Carolina voting scheme produces disproportionate results in elections for superior court judges and consistently degrades the influence of Republican voters "on the political process as a whole."[24] *Id.* at 132, 106 S. Ct. at 2810. Clearly, its complaint alleges disproportionate results.[25] RPNC claims that throughout the twentieth century, it has

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[24] We read the phrase "the political process as a whole," *Bandemer*, 478 U.S. at 132, 106 S. Ct. at 2810, to speak to the alleged unconstitutional effects of the challenged electoral scheme on the relevant political sphere. *See* Grofman, *Toward a Coherent Theory*, *supra*, at 50-51. *But see* Daniel H. Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection, in Political Gerrymandering* 64, 82 (Bernard Grofman, ed. 1990). Thus, we confine our analysis to evaluation of the claimed effect of the method of electing superior court judges on the political process of election of superior court judges within North Carolina.

[25] We also observe that RPNC's allegations of effect are sufficient to satisfy the liberal standard applied by the federal courts under Rule 12(b)(6). *See* Wright & Miller, *supra*, § 1356. Whether RPNC ultimately prevails, however, is a matter of proof, and not merely one of the adequacy of the pleadings. *See id.*

been, and continues to be, virtually impossible for a qualified candidate for a superior court judgeship to prevail, if running as a Republican. Specifically, RPNC states that only one Republican superior court judge has been elected in the approximately 220 elections held to fill this office since 1968. Yet, registered Republicans comprise approximately 27 percent of the voting population in North Carolina. Moreover, RPNC claims that consistency of voter habits combined with the geographical distribution of party affiliation throughout the state renders it likely that this trend will continue into the foreseeable future.

An election scheme, however, is not constitutionally infirm merely because it makes the election of a candidate slated by a particular political group more difficult. *Id.* at 131, 106 S. Ct. at 2810. Allegations of disproportionate results alone are insufficient. *Id.* at 131-32, 106 S. Ct. at 2810. "Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132, 106 S. Ct. at 2810.

RPNC's complaint sets forth data to support its allegations that not only are the election results disproportionate, but also that the nomination and slating of candidates is affected. Claiming that the method of electing superior court judges inhibits potential Republican candidates from seeking this office, RPNC points to data revealing that in the 1984 and 1986 general elections of 40 judgeships up for election, only four were contested by Republican candidates, and that since 1968, of approximately 220 judgeships up for

election, a Republican candidate offered for election in only ten. RPNC maintains that these data demonstrate that few Republicans will offer to run since the chance of success is almost nonexistent. RPNC also asserts that the method of electing superior court judges diminishes campaign contributions for these elections because potential contributors are unwilling to donate money or other resources to a candidate who is perceived to be an almost certain loser. Thus, the complaint does contain allegations of an effect that goes beyond mere disproportionate election results.[26]

Importantly, Republican success in other elected positions in North Carolina affirms our conviction that RPNC has sufficiently alleged more than a de minimis effect on the political process of electing superior court judges. Data offered by RPNC and NCSBE reveal that Republicans prevail in statewide elections for positions that are truly statewide offices and in districtwide elections for positions in which the officials actually function in a local capacity. For example, district judges in North Carolina, like superior court judges, have statewide jurisdiction, *see* N.C. Gen. Stat. §§ 7A-240, 7A-270 (Michie 1989), but are elected by

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[26] NCSBE implores us to hold that RPNC's complaint fails to satisfy *Bandemer* because it lacks supporting allegations and amounts to little more than a compilation of conclusory statements. *See Badham v. March Fong Eu*, 694 F. Supp. 664, 670-71 (N.D. Cal.1988) (holding that complaint setting forth repetitive and conclusory claims failed to satisfy requirement of *Bandemer* that plaintiff allege exclusion from the political process as a whole), *aff'd mem.*, 488 U.S. 1024, 109 S. Ct. 829, 102 L. Ed. 2d 962 (1989). Our review discloses, however, that the allegations are sufficient in number, detail, and variety of particulars to avoid the problem of repetitive or conclusory statements.

district, *see* N.C. Const. art. IV, § 10; N.C. Gen. Stat. § 7A-140 (Michie 1989). According to RPNC, between 1968 and 1986, nine districts have elected Republicans to this office. It is undisputed that Republican candidates have won the races for Governor in three of the last five elections, that four of the last six elections for United States Senator have resulted in Republican victories, and that currently four of eleven members of the United States House of Representatives from North Carolina are Republicans. In addition, numerous Republicans have been elected to the General Assembly, the North Carolina Court of Appeals, and the North Carolina Supreme Court. Republican strength in North Carolina is sufficient to elect officials when the election base mirrors the area served by the official, focuses the attention of the electorate, and allows the electorate to become informed about the candidates.

Contests for superior court judgeships, on the other hand, involve statewide elections even though the office is essentially a local one and with very few exceptions, candidates are known only within their local areas. This combination of factors -- the status as a statewide candidate for a local office, the requirement to run in a statewide election, and the placement on a ballot with numerous other candidates seeking the same office but from different local districts -- encourages and as history has demonstrated, results in straight-party voting. Voters have little incentive to focus on individual candidates who reside in other districts and thus will discharge their duties in areas of the state distant from the voters' local area.

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS CONTINUED . . .

We recognize that RPNC has not alleged that Republicans have been "excluded from participating in the affairs of their own party or from the processes by which candidates are nominated and elected," *Bandemer*, 478 U.S. at 137, 106 S. Ct. at 2813, and that to the extent *Bandemer* might be read to require such allegations in order for a political group to allege exclusion from the political process as a whole, RPNC's claims would fail. However, we cannot conclude that a political party that has clearly alleged an effect that amounts to more than disproportionate election results must also allege and ultimately prove this type of exclusion. To do so would hold, in effect, that regardless of the specific allegations of its complaint an identifiable political group could not survive a motion to dismiss or prevail on the merits of its claim. We decline to adopt a construction of *Bandemer* that would render nugatory its holding that political groups may bring claims of partisan gerrymandering.

In determining whether a group has been shut out of the political process as a whole, the Supreme Court considers it relevant to examine the responsiveness of the elected official to the interests of the minority political group. *See id.* at 131, 106 S. Ct. at 2809-10. RPNC concedes that it has no complaint concerning the performance of superior court judges, that while elected judges are representative governmental officials, they do not represent constituents in the same sense as elected members of the legislative and executive branches, and that consequently, superior court judges could not be found to inadequately represent minority group interests. Nevertheless, the fact that superior court judges perform a different representative function does not

mean an identifiable political group should have no protected rights in electing them once a state chooses to select judges through an election system that allegedly fails to comport with the Fourteenth Amendment. We hold, therefore, that RPNC has set forth allegations of an actual discriminatory effect sufficient to state a claim of vote dilution brought about by political gerrymandering.

D.

Our conclusion that RPNC has set forth sufficient allegations of a violation of the Fourteenth Amendment to survive a motion to dismiss for failure to state a claim, we emphasize, is narrow and wholly dependent on the egregious nature of the alleged systemic discrimination. *See* Alfange, *supra* note 15, at 179 (arguing that judicial intervention should be limited to cases displaying flagrant and obvious abuse to avoid "exposing virtually every districting plan to judicial scrutiny"). The confluence of the alleged facts, including the unique claim of a near century-long dearth of political diversity among superior court judges in North Carolina, and the certainty of a similar future, compels our holding. Indeed, we believe that if RPNC had alleged even a modicum of electoral success or access to the political process, its claim might not have withstood a challenge under Rule 12(b)(6). And, whether RPNC ultimately will prevail on its claim is not before us.

We remain mindful of Justice Frankfurter's admonition that courts should remain reticent to become ensnared in the "political thicket" of adjudicating gerrymandering claims, *Colegrove v. Green*, 328 U.S. 549, 556, 66 S. Ct.

1198, 1201, 90 L. Ed. 1432 (1946), and of the more recent concern expressed by Justice O'Connor in *Bandemer* that judicial consideration of claims of political gerrymandering will inevitably lead to a constitutional requirement of "some form of rough proportional representation for all political groups," *Bandemer*, 478 U.S. at 145, 106 S. Ct. at 2817 (O'Connor, J., concurring in judgment); *see also* Alfange, *supra* note 15, at 186-87 (discussing evils of proportional representation). We fully share these apprehensions. Nonetheless, we remain bound by the dictates of *Bandemer*. *See United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L. Ed. 49 (1801).

V.

RPNC also maintains that the North Carolina method of electing superior court judges infringes upon its rights to free speech and association in violation of the First Amendment. Specifically, RPNC argues that the electoral system prevents Republicans from fully and effectively participating in the political process, chills the desire of Republicans to engage in vigorous debate and to seek superior court judgeships, and constitutes a state-imposed, de facto requirement of political affiliation with the Democratic Party.[27] Because

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[27] In *Badham*, 694 F. Supp. at 675, the district court rejected a similar First Amendment claim based on political gerrymandering. At oral argument, NCSBE argued that the summary affirmance of *Badham*, 488 U.S. 1024, 109 S. Ct. 829, 102 L. Ed. 2d 962, bound this court and required our rejection of this claim, *see Anderson*, 460 U.S. at 784 n. 5, 103 S. Ct. at 1568 n. 5 (precedential effect of summary affirmances applies to no more than the exact issue decided). However, the First

(continued...)

the authority offered by RPNC is readily distinguishable and its reasoning is not compelling, we conclude that RPNC fails to state a claim under the First Amendment.[28]

A.

"[T]here is practically universal agreement that a major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs. This of course includes discussions of candidates, . . . the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-219, 86 S. Ct. 1434, 1436-37, 16 L. Ed. 2d 484 (1966). In addition, it is clear that "[t]he First Amendment protects political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15, 96 S. Ct.

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[27](...continued)
Amendment issue raised before the district court was not presented to, and consequently was not decided by, the Supreme Court, *see Badham v. March Fong Eu*, 56 U.S.L.W. 3822 (U.S. May 31, 1988) (No. 87-1818). Therefore, we conduct an independent inquiry into the sufficiency of RPNC's First Amendment claims.

[28] This court has held that in voting rights cases, no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim. *See Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1359 (4th Cir.1989) (First Amendment offers no protection of voting rights *beyond* that afforded by the Fourteenth and Fifteenth Amendments.), *cert. denied*, 496 U.S. 906, 110 S. Ct. 2589, 110 L. Ed. 2d 270 (1990); *Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981) (same), *cert. denied*, 457 U.S. 1120, 102 S. Ct. 2933, 73 L. Ed. 2d 1333 (1982). Since RPNC has stated a Fourteenth Amendment claim, we must address the First Amendment issues.

612, 632, 46 L. Ed. 2d 659 (1976) (per curiam). RPNC asserts that the First Amendment protects the rights of citizens to cast an effective vote regardless of political persuasion and to effectively associate for the advancement of political beliefs. Because the North Carolina election system prevents Republicans from electing the candidates of their choice for superior court judgeships, RPNC contends that these alleged rights have been violated.

RPNC confuses the protection offered by the First and Fourteenth Amendments, and in so doing, attempts to extend the guarantees of the First Amendment.[29] As noted previously, the Equal Protection Clause of the Fourteenth Amendment ensures equal weighing of votes, or to use RPNC's terms, equal effectiveness of votes. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). The First Amendment, in contrast, protects the right to cast an effective vote by prohibiting restrictions

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[29] We recognize that there is scholarly support for the extension of the ballot access reasoning to political vote dilution claims. *See, e.g.*, Hess, *supra* note 23, at 231-32 ("A first amendment analysis provides an effective means of balancing the constitutional interests of political parties . . . in light of the legitimate interests of the state."); Emily M. Calhoun, *The First Amendment And Distributional Voting Rights Controversies*, 52 Tenn. L. Rev. 549, 588-598 (1985) (if state uses opinion as basis for distribution of votes, state must show compelling state interest); Harris Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket?*, 1 J.L. & Pol. 357, 373 (1984) (Political gerrymanders "strike at the heart of the rights of free speech and free association" because they "are designed to limit the effectiveness of organized political activity."). We find these arguments unpersuasive, and therefore decline to apply them here.

on ballot access that impair the ability of citizens to express their political preferences, or that limit the opportunity for citizens to unite in support of the candidate of their choice. *See Anderson v. Celebrezze*, 460 U.S. 780, 787-88, 794, 103 S. Ct. 1564, 1569-70, 1572-73, 75 L. Ed. 2d 547 (1983); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S. Ct. 983, 990, 59 L. Ed. 2d 230 (1979). The North Carolina method of election for superior court judges does not entail direct impediments prohibited by the First Amendment. Unlike the complainants in the ballot access cases, Republicans in North Carolina may run for superior court judgeships, vote for the candidate of their choice, and associate together in support of their chosen candidate. Although the North Carolina method of election of superior court judges does prevent the realization of Republican political goals, Republicans are not prevented from participating, as individuals or as a group, in the election of superior court judges. The First Amendment guarantees the right to participate in the political process. It does not guarantee political success.

B.

RPNC also asserts that the system of electing superior court judges chills the rights of Republicans to engage in vigorous debate, and to seek superior court judgeships in violation of the First Amendment. A chilling effect occurs when a substantially overly-broad law deters persons whose expression is constitutionally protected from exercising their First Amendment rights. *See New York v. Ferber*, 458 U.S. 747, 768-73, 102 S. Ct. 3348, 3360-63, 73 L. Ed. 2d 1113 (1982). Absent a governmental action that threatens to

punish protected speech, the substantial overbreadth doctrine does not apply, and a chilling effect does not occur. *See Broadrick v. Oklahoma*, 413 U.S. 601, 611-618, 93 S. Ct. 2908, 2915-19, 37 L. Ed. 2d 830 (1973). The North Carolina laws at issue do not subject Republicans to the threat of civil or criminal penalties for engaging in political expression. *See* N.C. Const. art. IV, § 16; N.C. Gen. Stat. §§ 163-104, 163-106(i) (Michie 1991). Election practices that do not threaten to penalize protected speech, but that may have some effect on the decision whether to seek candidacy or engage in debate, are not overly broad. Thus, RPNC's overbreadth claim does not give rise to a constitutional infringement.

C.

Finally, RPNC argues that because the government may not unjustifiably require an individual to choose between accepting public employment and taking action contrary to their chosen political affiliation, *see, e.g., Elrod v. Burns*, 427 U.S. 347, 359-60, 96 S. Ct. 2673, 2683, 49 L. Ed. 2d 547 (1976), the Democratic-controlled legislature may not similarly require individuals to choose between political office and affiliation with the Republican Party. That the hiring of low-level public employees may not be predicated upon political party affiliation is clear, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64-65, 110 S. Ct. 2729, 2732, 111 L. Ed. 2d 52 (1990);[30] however, North Carolina superi-

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[30] Political party affiliation may be an appropriate consideration if the position is one that requires as a qualification for its performance, (continued...)

or court judges are elected public officials rather than employees hired by the government. This distinction between the government as hiring authority versus the electorate as hiring authority is crucial. An employee's right to free speech is violated only when government inappropriately requires an employee to affiliate with a certain party. *Id.* at 73-79, 110 S. Ct. at 2736-39. On the other hand, the electorate does not operate under this constraint. *Cf. Hudgens v. NLRB*, 424 U.S. 507, 513, 96 S. Ct. 1029, 1033, 47 L. Ed. 2d 196 (1976) ("[T]he constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state."). Seeking to avoid the result that follows from this proposition, RPNC argues that by prescribing the current method of election the legislature, a governmental body, has usurped the electorate's selection function. We are not persuaded. The North Carolina electorate, not the General Assembly, selects superior court judges. Therefore, RPNC has failed to state a claim for the infringement of its rights to free speech and association in violation of the First Amendment.

VI.

In sum, we hold that RPNC's claim of political gerrymandering in the election of North Carolina superior court judges presents a justiciable question and that its complaint states a claim upon which relief may be granted under the Fourteenth Amendment. We further hold that

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[30](...continued)
affiliation with a particular political party. *Rutan*, 497 U.S. at 64-65, 110 S. Ct. at 2732.

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS CONTINUED . . .

RPNC has failed to state a claim under the First Amendment. Thus, we reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

REVERSED IN PART; AFFIRMED IN PART; AND REMANDED.

DISTRICT COURT ORDER OF JUNE 6, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 88-263-CIV-5-F

REPUBLICAN PARTY OF NORTH CAROLINA, et al., Plaintiffs,	)	
v.	)	ORDER
JAMES G. MARTIN, Governor of North Carolina, et al., Defendants,	)	
and	)	
NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS, Defendant-Intervenor.	)	

NATURE OF THE CASE

Plaintiffs have brought this action pursuant to 42 U.S.C. § 1983, claiming that the present method by which Superior Court judges are elected in North Carolina (district nomination followed by statewide election) denies plaintiffs the equal protection of the laws by "structurally diluting" the voting franchise of Republican voters and violates their First and Fourteenth Amendment rights of freedom of speech and association. Plaintiffs also bring a federal constitutional

challenge to the candidate residency requirement for Superior Court judges, which since 1987 has required that a candidate for nomination for a Superior court judgeship be resident, at the time of filing a notice of candidacy, in the district he or she wishes to serve. In addition, plaintiffs assert various State law claims.

Plaintiffs herein include the Republican Party of North Carolina, a statutorily recognized political party, see N.C. Gen. Stat. § 163-96, registered Republican voters, and those voters who, although not registered as Republicans, predictably vote for Republican candidates, and are thus Republican voters. The individual plaintiffs also include three former unsuccessful Republican candidates for Superior Court. Defendants herein are sued in their official capacities as those officers and officials who are responsible for conducting elections according to the method established by the North Carolina General Assembly. The defendant-intervenor, the North Carolina Association of Black Lawyers ("NCABL"), is a statewide organization of black lawyers and law students.

This matter is now before the court on defendants' Motion to Dismiss this entire action, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

The facts, undisputed except as otherwise noted, are as follows:

All North Carolina judges were appointed until the State Constitution was rewritten in 1868. J. Sanders, A

Brief History of the Constitutions of North Carolina (1983). Since 1868, the State Constitution has provided that it is the General Assembly's prerogative to decide whether resident Superior Court judges are to "be elected by the qualified voters of the State or by the voters of their respective districts." N.C. Const. art. IV, § 16. The State Constitution has further required, also since 1868, that a Superior Court judge "reside in the district for which he is elected." N.C. Const. art. IV, § 9(1). Ultimately, the legislature adopted a statewide election system in 1877, Ch. 255, Public Laws 1876-77, and has maintained it continuously since that time.

In 1915, the General Assembly adopted a primary system for political parties to nominate their candidates, Ch. 101, Public Laws 1915, and since that time candidates for Superior Court have been nominated in primaries held in the districts for which they wish to serve. Candidates in the primary run at large within the district for that election year. Although no statute by itself specifies district primaries, the State Board of Elections has always used district nominations, regardless of the party holding a majority of the board. In addition, various provisions of the State election law indicate acceptance of the practice by the General Assembly. For example:

> -- N.C. Gen. Stat. § 163-156(c)(2) provides that for certain vacancies occurring after filing has begun, nomination of candidates for Superior Court judge are to be made "by the appropriate district executive committee of each political party." (Emphasis added.)

> -- N.C. Gen. Stat. § 163-106(i) requires residence in a district in order to file notice of candidacy.
>
> -- N.C. Gen. Stat. § 163-109 provides that county boards of elections are to furnish ballots for all offices where district primaries are conducted, and lists Superior Court judge among those offices.
>
> -- N.C. Gen. Stat. § 163-114 provides that, if a party nominee for Superior Court judge dies, resigns or is disqualified before the general election, the vacancy is to be filled only by the party executive committee members living in the judicial district.

Finally, when North Carolina's method of electing Superior Court judges was challenged in Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd mem., 409 U.S. 807 (1972), a three-judge district court apparently concluded that the legislature intended district primaries even though no single statute authorized the procedure. See id. at 930 ("The General Assembly has prescribed that the regular judges shall be nominated in a primary election conducted in their respective districts but shall be elected in the general election by statewide vote.").

The North Carolina Constitution requires the General Assembly to divide the State into Superior Court judicial districts and to provide for the election of Superior Court judges. N.C. Const. art. IV, § 9(1). The counties of North Carolina are organized into four judicial divisions which,

until 1987, were divided into a total of thirty-four judicial districts. Each division and judicial district contained one or more counties and one or more resident Superior Court judges. Most of the judicial districts encompassed more than one county and all districts followed county boundary lines. Seventeen of the judicial districts had more than one judge and those districts had forty-three of the sixty-four resident Superior Court judges.

Pursuant to Chapter 509 of the Session Laws of 1987 ("Chapter 509"), many of the judicial districts were split, and there are now sixty judicial districts. In forming the new judicial districts, counties frequently were split, and some districts now consist of parts of more than one county. Sixteen of the new judicial districts did not contain a courthouse and had no separate clerk of court or other official associated with the traditional judicial districts, except for the resident Superior Court judge assigned thereto.

This court has previously recognized that "[o]ne effect of [Chapter 509] was to give black voters a more equal opportunity to participate in the political process and to elect superior court judges of their choice." Order of October 4, 1988, at 5. Plaintiffs do not challenge the new judicial districts, but do allege that the configuration thereof was designed to include an incumbent Democratic Superior Court judge[1], and that this configuration, coupled with continued statewide election, is evidence of the defendants intent to

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[1] Inasmuch as at the time of the enactment of Chapter 509, all Superior Court judges were Democrats, no other result could have been obtained without the removal of an incumbent from office.

perpetuate the Democratic dominance of the Superior Court judiciary. Defendants deny this allegation.

In its consideration of Chapter 509, the General Assembly's Democratic majority rejected amendments offered by Republican legislators and supported by Governor James G. Martin ("Governor Martin"), a Republican, which would have eliminated the statewide election of resident Superior Court judges, and, instead, would have provided for district election. Plaintiffs contend, and defendants deny, that the Democratic majority did so out of a desire to protect Democratic incumbents from defeat by Republicans in the general election.

As the court noted in its October 4, 1988, Order, on at least eight occasions since 1961, Republican members of the legislature have introduced and sought passage of various types of legislation to provide for district-based (or division-based) elections for Superior Court judges. Order at 5-6. The Democratic-controlled General Assembly has defeated each effort. Plaintiffs contend, and defendants deny, that the sole reason the Democratic majority defeated the bills was its desire to preclude any probability of a Republican ever being elected to a Superior Court judgeship.

The North Carolina Constitution mandates that Superior Court judges ride circuit. N.C. Const. art. IV, § 11 ("The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed. For this purpose the General Assembly may divide the State into a number of judicial divisions."). As previously stated, the state currently is divided into four divisions, the largest of which contains thirty-two counties.

DISTRICT COURT ORDER OF JUNE 6, 1991 CONTINUED . . .

Although the geographic areas served by resident Superior Court judges have not been constant in the historical past, since 1915 the judges have rotated district to district within their respective divisions. The Courts of Yesterday, Today and Tomorrow in North Carolina, 24 Popular Govt. 11 (1958). Today, rotation of judges is carried out according to a predetermined schedule. Periodically, the judges of each division prepare a rotation schedule for the division and submit it to the Chief Justice, who examines it to ensure that a judge serves a six-month period in each district lying within his division for each regular judgeship allotted to the district. An effort is made to provide that, over a period of time, each judge will preside over sessions of court in every district of his division.[2]

In addition to mandated rotation, the Chief Justice may assign the judges to hold court outside their divisions, N.C. Const. art. IV, § 11, as said judges have statewide jurisdiction and duties, id. at art. IV, § 12(3). Assignment out of division occurred an average of 3.09% of the time (an annual average of 87 times) in the years from 1980 through 1987.

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[2] In an apparent attempt to somehow bolster their First Amendment claim, plaintiffs bring to the court's attention the fact that the North Carolina Administrative Office of the Courts temporarily suspended judicial rotation from October 1, 1990, until March 31, 1991, as a cost-cutting measure. See Exhibit A to Plaintiffs' Memorandum. Plaintiffs own exhibit shows that this suspension was a temporary, cost-cutting measure; and, particularly in view of the court's legal analysis infra. said suspension is not relevant to the instant action.

Before the enactment of Chapter 509, eight special Superior Court judges, appointed rather than elected, were available to be employed in districts where court overload or protracted or sensitive litigation required assistance from outside judges. Chapter 509 eliminated these judgeships.

Resident Superior Court judges exercise numerous unique statutory powers in the judicial district for which they are elected. For example, the Senior Resident Superior Court judge for a district appoints the Public Defender, N.C. Gen. Stat. § 7A-466, as well as fills vacancies in the Office of Clerk of Superior Court, N.C. Gen. Stat. § 7A-100. A Superior Court judge may also hear the return of a restraining order in the district in which he is resident. N.C. Gen. Stat. § 1-494.

Until Judge Howard Manning, Jr.'s 1988 election, no Republican candidate for Superior Court judge had been elected in this century. Since 1968, ten Republicans have run for resident Superior Court judge, and in four of these contests the Republican candidate would have been successful if resident Superior Court judges were elected by the qualified voters of the judicial district in question, rather than by statewide election. Complaint, para. 34. But, "[b]ecause an overwhelming majority of North Carolina's voters are Democrats and nominees for judicial office usually have no statewide reputation, the nominees of the Democratic Party invariably prevail in the statewide general elections." Republican Party v. Martin, 865 F.2d 1259, slip op. at 3 (4th Cir. 1988) (Table) (Unpublished).

North Carolina's system of electing Superior Court judges has been the subject of legal challenges in the past,

and certain legal principles have emerged from those earlier decisions. In Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd mem., 409 U.S. 807 (1972), the three-judge district court and the United States Supreme Court rejected a Republican voter's claim that the State's combination of district nomination and statewide election violated the Fourteenth Amendment. The district court, after concluding that Superior Court judges in North Carolina are "hybrid officials with both local and statewide functions and authority," id. at 933, stated that "[t]here can be no doubt as to the validity of the provisions of the North Carolina Constitution requiring the election of Superior Court judges by districts or statewide as prescribed by the legislature . . . or that they reside in their respective districts." Id. at 930 (citations omitted). The court also rejected the plaintiff's argument that the electoral system impermissibly diluted his or other persons' voting strength: the "hybrid" nature of Superior Court judges' mixture of local and statewide duties, according to Holshouser, provides "a reasonable basis for the election procedure" mixing district and statewide voting. Id. at 933.

In Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985), aff'd, 477 U.S. 901 (1986), this court held that North Carolina Superior Court elections are subject to the preclearance requirements of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Thus, any changes in judicial elections must be precleared by the United State Department of Justice to ensure compliance with the federal Voting Rights Act.

The case of Alexander v. Martin, No. 86-1048-CIV-5 (E.D.N.C. 1987), involved a challenge to the State's Superior Court elections based on both Section 2 of the

Voting Rights Act, 42 U.S.C. § 1973(b), and the Fourteenth Amendment. The Alexander plaintiffs, who included as a plaintiff-intervenor the NCABL, alleged that certain features of the election system had the purpose and effect of abridging non-white voting strength in Superior Court elections. The plaintiffs sought the elimination of staggered terms within multi-member judicial districts and the redrawing of district lines so as to enhance the ability of non-white voters to nominate and elect judicial candidates of their choice. Alexander was settled by a consent decree upon adoption by the North Carolina General Assembly of Chapter 509 of the Public Laws of 1987. Republican Party v. Martin, 866 F.2d 1259 (Table), slip op. at 4.

Defendants argue that Chapter 509, which is a target of plaintiffs Complaint in the present action, was enacted in part to meet the requirements of the Voting Rights Act and the concerns of the United States Attorney General and the Alexander plaintiffs. Defendants' argument is supported by the fact that the Alexander case was settled, and by the decision of the United States Attorney General, who precleared Chapter 509 on September 25, 1987, pursuant to Section 5 of the Voting Rights Act. As previously noted, the legislation maintained the State's long-standing combination of district nomination and statewide election of Superior Court judges, and eliminated staggered terms. It also redrew district lines in order to increase the number of non-white majority districts, apparently from two out of thirty-four to nine out of sixty. See also Republican Party v. Martin, 865 F.2d 1259 (Table), slip op. at 4 ("by design, a number of districts were created in which there were black voting majorities").

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Chapter 509 also adopted, for the first time in the State's history, a requirement that a candidate for nomination for a Superior Court judgeship be resident, at the time of filing a notice of candidacy, in the district in which he or she wishes to serve. The legislation states that this requirement "implements Article IV Section 9(1) of the North Carolina Constitution which requires regular Superior Court Judges to reside in the district for which elected." N.C. Gen. Stat. § 163-106(i). Plaintiffs allege, and defendants deny, that this requirement denies plaintiffs the equal protection of the laws and violates their First and Fourteenth Amendment rights of freedom of speech and association.

Governor Martin, a defendant in the present action, filed a complaint in his official and individual capacities in State court in December 1987, claiming that certain provisions of Chapter 509 violate the North Carolina Constitution. State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989). In particular, the Governor asserted that Chapter 509 infringed the State constitutional rights of voters, and of candidates; that the legislation had usurped the executive authority of the Governor; and that the legislation's pre-candidacy residency requirement unconstitutionally denies otherwise qualified candidates the right to seek office. A unanimous North Carolina Supreme Court rejected all of the Governor's contentions, holding that Chapter 509 "does not violate our State Constitution and is fully effective." Id. at 462, 385 S.E.2d at 486. The court found that the express and actual purposes of Chapter 509 were to provide for compliance with the federal Voting Rights Act and to improve the administration of justice. Id. at 450-51 n. 2, 385 S.E.2d at 479-80 n. 2.

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Plaintiffs initiated the present action in the United States District Court for the Middle District of North Carolina on November 4, 1987, and the case was transferred to this Court on March 29, 1988. Republican Party v. Martin, 682 F. Supp. 834 (M.D.N.C. 1988). The NCABL filed a motion to intervene, which this court denied on April 14, 1988. Said denial was reversed by the Fourth Circuit Court of Appeals, which observed that the NCABL "obtained what it appears to have wanted by the enactment of Chapter 509" and that "one may readily see" that the State's system of electing Superior Court judges, as modified by Chapter 509, better serves black voters' interests than the individual district elections sought by plaintiffs. Republican Party v. Martin, 865 F.2d 1259 (Table), slip op. at 5, 6.

After this ruling, discovery proceeded and plaintiffs noticed their intention to take the depositions of several members of the North Carolina General Assembly. On May 14, 1990, this court granted defendants' motion to quash plaintiffs' deposition subpoena addressed to State Representative Daniel T. Blue, holding that Representative Blue was "entitled to assert his common law legislative immunity to protect himself from being deposed concerning his legislative activities." Order of May 14, 1990, at 8.

This matter is now before the court on defendants' March 12, 1991, Motion to Dismiss this action, pursuant to Rule 12(b)(6), Fed. R. Civ. P., on the grounds that: (1) the Complaint raises a non-justiciable political question, (2) plaintiffs have not stated causes of action under either the First or Fourteenth Amendments, and (3) the action transgresses the doctrine of legislative immunity. Defendants have set forth the grounds and authorities supporting their

motion in an accompanying memorandum (henceforth, "Defendants' Memorandum"). Defendant-intervenor NCABL has submitted a memorandum joining in defendants' Motion to Dismiss. The NCABL expressly adopts defendants' arguments that the Complaint presents a non justiciable political question and that the plaintiffs have not stated causes of action under the First and Fourteenth Amendments. It takes no position on defendants' alternative argument that the action should be dismissed because of the doctrine of legislative immunity. Defendant Intervenor's Response to Defendants' Motion to Dismiss at 1. The plaintiffs have submitted a Memorandum in Opposition to Defendants' Motion to Dismiss (hereinafter, "Plaintiffs' Memorandum," or "Response"), and defendants have tendered a Reply Memorandum to the same. Accordingly, defendants' Motion to Dismiss is now ripe for ruling.

For the reasons discussed infra, the court finds defendants' first ground for dismissal (ie., that the Complaint raises a non-justiciable political question) to be persuasive, and, accordingly, GRANTS defendants' Motion to Dismiss

on this ground.[3] The court thus need not -- and does not -- address defendants' second and third arguments.

DISCUSSION

The Complaint in the present action could be interpreted as addressing a wide variety of political claims, and it therefore is necessary to distill from it the legal issues it attempts to raise, before turning to the merits of the issues raised.

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[3] Defendants' Motion to Dismiss comes nearly three and one-half years after the filing of this action. Defendants' first two grounds for dismissal are of a purely legal nature, for which little or no discovery was necessary, and none of the relevant cases cited in Defendants' Memorandum concerning these arguments was decided after 1989. Defendants' third argument, which concerns legislative immunity, is based on an order entered by this court on May 14, 1990. Had this Motion to Dismiss been filed sooner, the parties and the court would have avoided the waste of much judicial and private resources. See, e.g., Republican Party v. Martin, ___ F.R.D. ___, 1991 WL 56425 (E.D.N.C. 1991) (individual review by the court of 369 of Governor Martin's documents after he had opposed discovery of the same on the grounds of executive privilege, attorney-client privilege, and work product protection).

That much having been said, the court notes that Defendants' Memorandum and Reply Memorandum are exceptionally well briefed, as is plaintiffs' Response, and are in keeping with the high standard of advocacy exhibited by all the parties throughout the course of this litigation.

I.

PLAINTIFFS ACTUALLY SEEK RELIEF AGAINST ONLY SOME OF THE ELECTORAL PRACTICES DISCUSSED IN THEIR COMPLAINT

Plaintiffs enumerate four aspects of North Carolina's method of electing Superior Court judges that in their view are unlawful: Statewide general elections, Complaint, para. 46; the requirement that candidates run for judgeships in particular districts, id. at para. 47; district nominations, id. at para. 48; and the pre-registration residency requirement for Superior Court candidates, id., at para. 49.

All of these practices are alleged to have the purpose and synergistic effect of infringing the plaintiffs' First Amendment rights and of restricting the influence of Republican voters on the political process as a whole in violation of the Fourteenth Amendment. Plaintiffs' Complaint also contains a lengthy litany of grievances stemming from actions taken by the North Carolina General Assembly's Democratic majority vis-a-vis the Republican minority. However, the court perceives that plaintiff's federal constitutional argument is directed almost entirely against the practice of statewide elections for Superior Court judgeships as it exists in conjunction with district-wide nomination, and, to a lesser extent, against the pre-registration residency requirement.

Although plaintiffs assert that nomination by district primary and statewide election to particular judgeships violate the Fourteenth Amendment and lack State statutory authority, Complaint, paras. 25, 26, 47, 48, the chief form

of relief they seek would involve enforcing by injunction one aspect of current North Carolina law. Prayer for Relief, para. 2.[4] In fact, plaintiffs are critical of district nomination and district specific election only insofar as they exist in conjunction with the statewide election of Superior Court judges. Complaint, paras. 50, 51. If this court were to grant the injunction plaintiffs request, candidates for Superior Court judgeships would continue to seek nomination through district primaries, as under current law; candidates for Superior Court judgeships would continue to be elected to serve in particular districts, as under current law[5]; and

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[4] The two substantive paragraphs in the Plaintiffs' prayer for relief, Prayer for Relief, paras. 1, 2, read:

1. A declaration that the voting customs, practices and procedures complained of herein constitute unlawful structural dilution of the voting franchise of Republican Voters and an unlawful restriction of their fundamental rights of freedom of speech and association.

2. A preliminary and permanent injunction prohibiting the defendants from conducting elections for resident Superior Court judge under the existing system and an order that such elections be conducted by judicial district (without a candidacy residency requirement) for both nomination and election in such a manner as does not unlawfully discriminate against Republican candidates and Voters.

[5] Plaintiffs assert that this requirement of current law -- which, it should be emphasized, they do not seek to change -- constitutes a "numbered post" system. Complaint, para. 27. This is an incorrect use of the term, which refers to the practice of requiring candidates for office in multi-member districts to run for specific seats. As the North Carolina Supreme Court has observed, "neither numbered seats nor staggered terms exist in multi-seat judicial districts in North Carolina after the passage of Chapter 509." State ex rel. Martin v. Preston, 325 N.C. at 450-51 n. 2, 385 S.E.2d at 479-80 n. 2.

Superior Court judges would be required to reside in their particular districts once elected, as under current law. Thus, plaintiffs' Complaint boils down to a request that this court find the State's long-standing choice of choosing Superior Court judges by combining district-wide primaries with statewide general elections, unconstitutional. See also Order of October 4, 1988, at 1 ("Plaintiffs challenge the voting custom, practice, or procedure of district nomination followed by statewide election of [Superior Court] judges as violative of the first and fourteenth amendments to the United States Constitution.").

II.

PLAINTIFFS' STATE LAW CLAIMS

The plaintiffs' state law claims may be dealt with summarily. The assertion that nomination by district or election to specific districts lacks statutory authority is without merit. While no specific statute prescribes either practice, the General Assembly repeatedly has enacted statutes predicated on the existence of both, most recently in the candidate residency requirement at issue in this action. See supra at pp. 3-4. Moreover, as also discussed supra at pp. 3-4, the State Board of Elections, which is statutorily charged with administering the State election laws, has followed these practices continuously since 1915. See also N.C. Gen. Stat. § 163-22(a) (empowering Board to make reasonable rules and regulations); Comm'r of Insurance v. N.C. Automobile Rate Administrative Office, 294 N.C. 60, 67, 241 S.E.2d 324, 329 (1978) (according weight to the "construction of statutes adopted by those who execute and administer them").

Plaintiffs' State constitutional challenge to Chapter 509's candidate residency requirement has been foreclosed definitively by the North Carolina Supreme Court in Preston, 325 N.C. 438, 385 S.E.2d 473.

III.

PLAINTIFFS' FEDERAL CONSTITUTIONAL CHALLENGE TO THE RESIDENCY REQUIREMENT

The court finds plaintiffs' federal constitutional challenge to the candidate residency requirement to be unavailing. The court perceives that said challenge has been foreclosed by the Supreme Court's summary affirmance in Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), aff'd mem., 401 U.S. 968 (1971) and 405 U.S. 1035 (1972), even if the court assumes, arguendo, that partisan motives played a part in its enactment.

In Hadnott, a black plaintiff challenged Alabama's one-year prior residency requirement on candidates for state circuit judgeships. Despite allegations that the residency requirement discriminated against the political rights of black voters and candidates, 320 F. Supp. at 122, and an undeniable history of racial discrimination in voting rights, the district court and the Supreme Court upheld the requirement. Because of the nature of the office of an Alabama circuit judge -- an office very similar to that of a North Carolina Superior Court judge, see id. at 119-121 -- the Hadnott district court found "a compelling state interest in exposing to the voters for a substantial period of time before election the person who will be a candidate for state circuit judge." Id. at 119-20. Where a state has chosen to elect the judges

of its trial courts of general jurisdiction, Hadnott holds that imposition of a residency requirement for judicial candidates serves important interests of the state and of the voters. Id. at 119-121.

And, where the residency requirement is not unreasonable in the length of time required, it does not violate the Constitution. See Clements v. Fashing, 457 U.S. 957, 967-72 (1982) (plurality) (The Court, in rejecting First Amendment and Equal Protection challenges to a two-year "waiting period" for certain officeholders seeking to run for a state legislature, commented that "[a] 'waiting period' is hardly a significant barrier to candidacy," held that "this sort of insignificant interference" need only rest on a "rational predicate" in order to survive constitutional challenge, and noted that it had "upheld a 7-year durational residency requirement for candidacy," in Chimento v. Stark, 414 U.S. 802 (1973), summarily aff'g 353 F. Supp. 1211 (N.H.)."). See also Sununu v. Stark, 383 F. Supp. 1287 (D.N.H. 1974), aff'd mem., 420 U.S. 958 (1975) (upholding 7-year residency requirement for state senatorial candidates). Cf. Billington v. Hayduk, 439 F. Supp. 975, 978-79 (S.D.N.Y. 1977) (distinguishing Hadnott and invalidating a "merely arbitrary" five-year residency requirement for county executives), aff'd on other grounds, 565 F.2d 824 (2d Cir. 1977). North Carolina's residency requirement for those persons seeking to file a notice of candidacy is certainly not unreasonable in the length of time required. All that is required is that the potential candidate be, "at the time of filing the notice of candidacy a resident of the judicial district as it will exist at the time the person would take office if elected." N.C. Gen. Stat. § 163-106(i).

Accordingly, as the Supreme Court of North Carolina recently found, the candidate residency requirement of Chapter 509 is a "reasonable interpretation" of the State Constitution's residency requirement for judges, Preston, 325 N.C. at 462, 385 S.E.2d at 486. The existence of this valid and important basis for the residency requirement renders it constitutionally valid even if, as plaintiffs allege, partisan motives also played a role in the requirement's creation.[6]

In any event, the plaintiffs' complaint against the residency requirement appears to be that the residency requirement "aggravates the gross mathematical inequality of voting power among nomination districts and arbitrarily and capriciously renders the processes leading to nomination and election unequal for similarly situated potential candidates," because attorneys who live in less populated judicial districts are given an unequal opportunity to be nominated for office

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[6] The court notes that, while plaintiff's allegation of partisan motivation must be accepted for the purposes of the present Motion to Dismiss, only a slim basis for the allegation is alleged, resting as it apparently does on a letter from counsel for the NCABL to the United States Department of Justice written during that Department's preclearance review of Chapter 509 under the Voting Rights Act. See Complaint, para. 12 and Exhibit B. Read in context and as a whole, the letter expresses the belief of counsel that the candidate residency requirement was designed to further the ability of minority voters in the newly created non-white majority districts to elect candidates of their choice, a purpose that furthers the goals of the Voting Rights Act and thus, ultimately, of the Equal Protection Clause itself. Such a reading does not indicate that its author believed that "the residency requirement was solely and directly intended to discriminate against Republican candidates and Voters." Complaint, para. 12. The court also notes that a single letter from counsel in ongoing litigation against the State (the Alexander case) is a weak indication of the intention of the State legislature.

compared to those candidates who live in more heavily populated districts. Plaintiffs' Memorandum at 4-5. The court perceives this to be a suggestion that the one person/one vote standard applies to judicial elections, a suggestion rejected by the Supreme Court in Wells v. Edwards, 409 U.S. 1095 (1973), as discussed in greater detail infra.

IV.

PLAINTIFFS' GERRYMANDERING CHALLENGE[7]

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[7] Plaintiffs' initial response to defendants' justiciability argument consists of the assertion that this court implicitly decided the question in plaintiffs' favor by denying their motion for a preliminary injunction. Plaintiffs' Memorandum at 10-11. This assertion is incorrect: this court has not yet decided the question of justiciability. Plaintiffs themselves quote this court's observations at the September 21, 1988, hearing on the motion for a preliminary injunction, in the course of which the Court stated that "I am inclined to think that the issue is justiciable but I want to emphasize again that these are not final opinions on my part but just observations." Id. at 11 (emphasis added). Plaintiffs claim that the court's Order of October 4, 1988, "implicitly found those issues [raised by plaintiffs] to present an appropriate occasion for judicial determination." Id. Said Order did nothing of the sort. Instead, it rejected plaintiffs' argument that they had demonstrated the likelihood of success on the merits necessary to justify issuance of a preliminary injunction. In doing so, the court wrote that Davis v. Bandemer, 478 U.S. 109 (1986), while holding that "certain group rights under the equal protection clause are justiciable . . . d[id] not supply the answer to the issue raised herein [as to the justiciability of the plaintiffs' claims]." Order at 11. The plaintiffs' current attempt to recast this court's explicit refusal to decide the justiciability question in their favor as such a ruling is without merit.

(continued...)

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Before 1986, it was widely assumed that claims of "political gerrymandering" were "political questions" and, as such, were not subject to judicial resolution. See, e.g., J. Nowak, R. Rotunda and J. Young, Constitutional Law, 800 (2d ed. 1983) (contrasting political gerrymandering with unconstitutional racial gerrymandering). The Supreme Court has described the political question doctrine as applying to cases in which there is present

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifari-

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[7](...continued)

Plaintiffs' citation of Bandemer in this regard, Plaintiffs' Memorandum at 11 n. 9, is inappropriate. In that case, the Supreme Court noted in passing that in ruling for the plaintiffs on the merits the court below necessarily had made an implicit judgment that the plaintiffs' claims were justiciable. Bandemer, 478 U.S. at 118. In the instant case, this court ruled against the plaintiffs on a motion for preliminary relief. The court does not perceive that such a ruling can be construed into a holding in plaintiffs' favor on a hotly contested and potentially dispositive issue.

> ous pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

Baker held that none of these characteristics were present in an action challenging a state legislative apportionment on the basis of disparities in the number of voters represented by each legislator, id. at 226, and the Court subsequently formulated the one person/one vote standard to govern similar actions. See Reynolds v. Sims, 377 U.S. 533 (1964). At almost the same time, however, the Court was unanimous in taking summary action amounting to a rejection of the argument that partisan 'gerrymandering' may be subject to federal constitutional attack under the Fourteenth Amendment. WMCA, Inc. v. Lomenzo, 382 U.S. 4, 6 (1965) (Harlan, J., concurring). The Court and most commentators agreed that it would be impossible to adjudicate equal protection challenges to political gerrymanders "without being forced to make a nonjudicial policy determination or to resort to a standard that is not judicially manageable." Davis v. Bandemer, 478 U.S. 109, 148 (1986) (O'Connor, J., concurring).

In Bandemer, however, the Supreme Court held that a gerrymandering suit brought by Indiana Democrats against Republican State officials did present a justiciable question of law. In Bandemer, the plaintiffs alleged that the Republican-controlled Indiana legislature had redrawn the state legislative districts in 1981 for the purpose and with the effect of minimizing or cancelling out the voting strength of an identifiable political minority, Democratic voters. Davis v. Bandemer, 603 F. Supp. 1479, 1482, 1490 (S.D. Ind. 1984),

rev'd, 478 U.S. 109 (1986). The techniques the district court found the Republican majority had employed purposefully to achieve this result were those familiar from racial gerrymandering cases -- irregularly shaped district boundaries obviously drawn with political demographics in mind, disregard for traditional boundaries, and a "peculiar mix of single-member and multimember districts." 478 U.S. at 116.

Plaintiffs, in candidly describing their attack on North Carolina's mode of electing Superior Court judges as a challenge to the election system's "fairness," Plaintiffs' Memorandum at 7, attempt to avoid the political question bar on judicial resolution of such challenges[8] by relying on an expansive and, in this court's view, incorrect reading of Davis v. Bandemer. Plaintiffs treat Bandemer as if it were a blanket repudiation of the political question doctrine in the area of state electoral systems. See, e.g., Plaintiffs' Memorandum at 7 (Bandemer "has now removed the political question bar [on] a challenge" to the fairness of state's mode of electing Superior Court judges).

However, the court believes that, for the purposes of the political question doctrine, the only difference between Bandemer and a (clearly justiciable) racial gerrymandering case was the fact that in Bandemer it was a group defined by political affiliation rather than by race that was alleging

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[8] The courts repeatedly have found that challenges to a statute's "fairness" are not actionable. See, e.g., Holshouser v. Scott, 335 F. Supp. at 933-34 ("We have no authority to pass upon the fairness of the election of Superior Court Judges in North Carolina. That is a political question to be resolved by the people and the legislature. We can only determine the constitutional validity of the statutes involved.").

invidious discrimination. The Bandemer Court's holding was, simply, that this difference alone did not convert a claim courts can adjudicate into one they cannot: "that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability." Bandemer, 478 U.S. at 125. Bandemer marks a significant development in the law of political questions and equal protection, but it is a development, not a radical reshaping. Bandemer did not hold that all complaints about political influence on the electoral process are legally cognizable, but only "decline[d] to hold that such claims are never justiciable" Id. at 124. The Bandemer Court reasoned that an allegation of political gerrymandering that tracks precisely "the racial gerrymandering claims that we have consistently adjudicated" could be decided using judicially manageable standards similar to those employed in the race area, id. at 125, and raised the same legal concerns about "fair and adequate representation" recognized in the one person/one vote cases. Id. at 126 n. 9.

In addition, Bandemer did not hold that claims of political gerrymandering are subject to the same legal standards employed in other cases; indeed, the Justices who believed Bandemer justiciable divided sharply on the proper standard. Id. at 185 n. 25 (Powell, J., joined by Stevens, J., concurring in part and dissenting in part) ("there is no 'Court' for a standard" for determining the merits). A four-justice plurality found that the Bandemer plaintiffs had failed to allege or demonstrate "a history of disproportionate results . . . in conjunction with strong indicia of lack of political power and the denial of fair representation." Id. at 139

(opinion of White, J.).[9] The plurality would require such a "threshold showing of discriminatory vote dilution . . . for a prima facie case of an equal protection violation" as well as a credible allegation of discriminatory intent. Id. at 143, 129 n. 11. Two justices would impose a "heavy burden of proof," requiring demonstration of a different set of factors and, under their standard, would have upheld the Bandemer plaintiffs' claim on the merits. Id. at 185 (Powell, J., joined by Stevens, J., concurring in part and dissenting in part).

Despite their disagreements, however, the plurality and Justices Powell and Stevens agreed on a number of essential points. Most importantly, these six justices found that it was crucial to the justiciability of the Bandemer complaint that it presented colorable allegations that the State of Indiana was denying the plaintiffs "fair and adequate representation" in the state's political process as a whole. Id. at 126 n. 9, 131-133, and at 162 (Powell, J., concurring in part and dissenting in part). In Bandemer, "the issue [was] one of representation," id. at 124, and as such presented a justiciable claim.

The plurality and Justices Powell and Stevens agreed, furthermore, that the Equal Protection Clause does not guarantee electoral success or forbid states to include political considerations in structuring their political processes. The "mere fact that a particular apportionment scheme makes it more difficult for a particular group" to win elections, "does not render that scheme constitutionally infirm," id. at 131. As Justices Powell and Stevens put it,

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[9] All page cites hereinafter to Davis v. Bandemer are to Justice White's plurality opinion except as otherwise noted.

the "common practice of the party in power to choose the redistricting plan that gives it an advantage" is not, in and of itself, the type of unconstitutional gerrymandering Bandemer renders suspect. Id. at 164-65 (Powell, J., concurring in part and dissenting in part).

The plaintiffs' efforts in the present action to satisfy Bandemer's justiciability requirements fall short. Bandemer involved the claim that a legislative majority was wielding its governmental power "to minimize or cancel out the voting strength of . . . political elements of the voting population," id. at 119 (citation omitted), thereby insulating itself from the need to accord the minority fair representation. It was the danger of a "lack of responsiveness by those elected to the concerns" of those they represent that justified judicial scrutiny of the state legislative redistricting scheme. Id. at 131-34. Accord id. at 169-70 (Powell, J., concurring in part and dissenting in part). Bandemer thus rests on the constitutional obligation of representative officials to represent all of their constituents, regardless of those constituents' racial or political affiliations. Because representative officials ought to take political considerations and constituents' views into account when they act, an electoral scheme that insulates them from those views raises justiciable questions of constitutional magnitude. See id. at 125 n.9.

In North Carolina, state senators and representatives hold clearly political offices. Today, both are directly elected by the citizens of North Carolina, and it is their function as representatives to synthesize the opinions of their constituents and reflect them in the debate and deliberation of public issues. The executive branch of the State government, headed by its highest officer elected at large within the

state, is also expected to bring the views and opinions which he offered the State electorate in seeking the Governorship to bear on the job of running the State machinery. A gerrymandered electoral scheme that insulates these representatives from political segments of the electorate would appear to be actionable under Davis v. Bandemer.

In the present case, in contrast, the plaintiffs' Complaint is with the State's mode of electing judges, the quintessentially non-representative governmental officials. Judges are not legally obligated to act in a politically responsive manner or to make decisions in accordance with the views of a constituency; indeed, the judicial obligation is to implement an impartial determination of the facts and application of the law to a case or controversy without regard to majority viewpoint or popular opinion. Such obligation is the very predicate of judicial integrity, and is frequently fulfilled to protect and enforce the constitutional rights of minorities. A departure from these principles is not to be lightly regarded. As the Supreme Court has observed, "[i]t is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard to the views of his constituents." Clements v. Fashing, 457 U.S. at 968 (plurality).

The Supreme Court rejected the idea that judges are representative officials for constitutional purposes in Wells v. Edwards, 409 U.S. 1095 (1973). Wells involved a one person/one vote challenge to Louisiana's method of electing judges. A three-judge district court dismissed the complaint, holding that

> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.
>
> "The State judiciary, unlike the legislature , is not the organ responsible for achieving representative government."

Wells v. Edwards, 347 F. Supp. 453, 455-56 (M.D. La. 1972) (quoting New York State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148, 153 (S.D.N.Y. 1967), aff'd mem., 409 U.S. 1095 (1973)). The Supreme Court summarily affirmed the district court's decision.[10] As the Fifth Circuit recently observed:

> It is impossible, given the single point at issue and the simple reasoning stated, to believe that the majority of the Supreme Court, in affirming Wells, did not concur in that reasoning. If there were doubt, however, it would be laid to rest by the terms of the dissent, which attacks the district court opinion in stern, egalitarian terms for having, like other

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[10] The Supreme Court has made it clear that lower courts are not "free to disregard . . . [v]otes to affirm summarily . . . [;] [these votes], it hardly needs comment, are votes on the merits of a case. . . . '[T]he lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.'" Hicks v. Miranda, 422 U.S. 332, 344-45 (1975) (citations omitted).

> opinions cited by it, held "that the one-person, one-vote principle does not apply to the judiciary." 409 U.S. 1095, 1096 n. 2, 93 S.Ct. 904, 905 n. 2.

Latin American Citizens Council # 4434 v. Clements, 914 F.2d 620, 627 (5th Cir. 1990) (en banc), cert. granted, ___ U.S. ___, 111 S.Ct. 775 (1991). The Fifth Circuit concluded that in Wells the Supreme Court "necessarily" held that "for purposes of the Equal Protection Clause of the Fourteenth Amendment judges 'do not represent people.'" Id. Wells, furthermore, was not an isolated decision. The courts that have addressed the issue of whether judges are representative officials for constitutional purposes unanimously have agreed that "judges do not 'represent' those who elect them." Clements, 914 F.2d at 626 n. 9 (collecting cases). The most recent judicial discussion of this issue is that of the en banc Fifth Circuit opinion in Clements.[11]

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[11] In their Memorandum, plaintiffs make much of the fact that the Supreme Court has granted certiorari to resolve the disagreement between Clements and Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988), on the applicability of Section 2 of the Voting Rights Act to judicial elections (specifically, whether the term "representative" as used in Section 2 applies to judges). Plaintiffs' Memorandum at 13-15. Plaintiffs appear to have misread the defendants' reason for citing Clements, which was for its reading of Wells. Clements and Mallory both were decided on the basis of the Voting Rights Act, not the Equal Protection Clause, and thus their disagreement and its eventual resolution by the Supreme Court are not germane to the present case. The court does not perceive that Mallory supports plaintiff's constitutional claim. See Mallory, 839 F.2d at 278 ("The plaintiffs' section 2 claim involves the construction of an Act of Congress, a different task from construing and applying a provision of the Constitution.") and at 277 (the 1982 amendments to the

(continued...)

Excluding elected state judges from the scope of constitutional rules designed to insure "the objective of fair and adequate representation," Bandemer, 478 U.S. at 125 n. 9, is wholly consistent with established equal protection principles. Rules, such as the one person/one vote requirement and Bandemer's prohibition of some partisan gerrymanders, prevent representative officials, such as legislators, from sheltering themselves against popular influence and pressure.

But American judicial systems are structured for the very purpose of insulating the judiciary from political influence and popular pressure. The United States Constitution, of course, provides for the appointment of federal judges and guarantees their salaries and their tenure during good behavior. The same concern to protect judges from ordinary politics is present in North Carolina law. The State Constitution affords Superior Court judges long terms of office, N.C. Const. art. IV, § 16 (eight years), requires special procedures for their removal from office, id. at § 17, guarantees their salaries against reduction, id. at § 21, and prohibits legislative interference with the rightful jurisdiction of the courts, id. at § 1. The Code of Judicial Ethics forbids

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[11](...continued)
Voting Rights Act were intended to eliminate from the Act the intent requirement of an action brought under the Equal Protection Clause).

In this regard, the court notes that although its ultimate holding in this section of the instant order is that, since judges are not representatives for constitutional purposes, a claim of partisan gerrymandering of judicial elections is not logically justiciable, the court expresses no opinion as to whether a claim of racial vote dilution in the election of judges is actionable under Section 2 of the Voting Rights Act.

candidates for judicial office from engaging in the constituent-oriented campaigning that those seeking representative offices typically -- and appropriately -- undertake. Superior Court judges in North Carolina, in short, are not representative officials, and the concern of Davis v. Bandemer that representative officials be representative simply does not apply to them.

If judges are not representatives for Fourteenth Amendment one person/one vote purposes, as Wells held, it is clear that the same conclusion holds in the present context. Davis v. Bandemer recognized the justiciability of certain challenges to the method by which a State structures its legislature, the representative element of its government. It did not authorize wholesale judicial intervention into "the manner in which a State has decided to govern itself," Clements v. Fashing, 457 U.S. at 972, or, in particular, into the form of a non-representative branch of state government.

An examination of the plaintiffs' arguments in this case reveals how remote their allegations are from the concerns the Supreme Court addressed in Davis v. Bandemer. Plaintiffs do not allege any "lack of responsiveness" on the part of North Carolina Superior Court judges. See Plaintiffs' Memorandum at 15 ("Candidly, the plaintiffs make no representation that [democratic] judges are not 'responsive.'"). Indeed, they acknowledge that "in the administration of justice, Republican judges may perform similarly to Democratic judges in similar cases under like circumstances." Plaintiffs' Answers to Defendants' Fourth Set of Interrogatories, Ans. # 11. Nothing in the plaintiffs' presentation of their case to date even suggests that North Carolina's method of electing Superior Court judges has led

those judges to act unfairly or arbitrarily toward plaintiffs, or toward Republican voters in general. Bandemer was an attack on the use of state legislative power by the state legislative majority, allegedly to serve the majority's selfish interests. By definition, nothing in plaintiffs' case raises the possibility that partisan political decisionmakers have taken action to exempt themselves from their constitutional duties toward any political segment of the State citizenry.

For the reasons discussed supra, the court does not perceive that the rationale of Bandemer applies to this case. Plaintiff's Complaint seeks this court's intervention not in order to protect any constitutional right recognized by the Supreme Court's decisions, but in order to restructure the manner in which a state has chosen to elect a non-representative branch of government. Under Baker v. Carr and Davis v. Bandemer this is a non-justiciable political question, and, accordingly, plaintiffs' Complaint is dismissed.[12]

CONCLUSION

For the reasons discussed supra, the court GRANTS defendants' Motion to Dismiss this action, pursuant to Rule 12(b)(6), Fed. R. Civ. P., and hereby DISMISSES this action.

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[12] The court's ruling is not, of course, a stamp of approval on the election system's wisdom or fairness." In this regard, the words of the Holshouser district court bear repeating: "We have no authority to pass upon the fairness of the election of Superior Court Judges in North Carolina. That is a political question to be resolved by the people and the legislature. We can only determine the constitutional validity of the statutes involved." 335 F. Supp. at 933-34.

DISTRICT COURT ORDER OF JUNE 6, 1991 CONTINUED . . .

SO ORDERED.

This 6th day of June, 1991.

s/James C. Fox
JAMES C. FOX
United States District Judge

DISTRICT COURT ORDER OF JULY 29, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
No. 88-263-CIV-5-F

REPUBLICAN PARTY OF NORTH CAROLINA, et al., Plaintiffs,	)	
v.	)	ORDER
JAMES G. MARTIN, Governor of North Carolina, et al., Defendants,	)	
and	)	
NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS, Defendant-Intervenor.	)	

This matter is now before the court on plaintiffs' Motion for Relief from Judgment Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, which asks this court to reconsider its June 7, 1991, Order (the "Order"), which dismissed the plaintiffs' Complaint in its entirety. Defendants and defendant-intervenor have filed memoranda in opposition to said Motion, and plaintiffs have filed a Reply Brief; accordingly, the Motion is now ripe for disposition.

The only argument which plaintiffs advance in support of their Motion is the claim that two decisions of the

United States Supreme Court, decided two weeks after the filing of the Order, undercut the reasoning contained in the same. In Chisom v. Roemer, ___ U.S. ___, 59 U.S.L.W. 4696 (June 20, 1991), the Supreme Court held that the "results test" of § 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. § 1973, applies to the election of state supreme court justices, based on an interpretation of the word "representatives," as contained in the 1982 amendment. Houston Lawyers' Assoc. v. Attorney General of Texas, ___ U.S. ___, 69 U.S.L.W. 4706 (June 20, 1991), extended that holding to elections of state trial judges. Plaintiffs assert that these two holdings are somehow broad enough to undermine this court's Order which found that plaintiff's Fourteenth Amendment Equal Protection gerrymandering claim, which challenged North Carolina's method of electing judges on grounds of partisan unfairness, is not justiciable. For the reasons that follow, the court does not perceive that a ruling that a method of judicial election may be the subject of attack under § 2 also implies that the same method may be the subject of a vote dilution challenge under the Equal Protection Clause.[1]

In its Order, the court explicitly rejected an earlier version of plaintiffs' argument that decisions construing § 2 are somehow applicable to plaintiffs' Fourteenth Amendment gerrymandering claim. The court, noting that "plaintiffs make much of the fact that the Supreme Court has granted

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[1] The court notes that, if indeed these two Supreme Court decisions did have any relevance to the plaintiffs' claims, it would be only to the plaintiffs' Fourteenth Amendment Equal Protection gerrymandering claim; the two decisions would not affect plaintiffs' other federal and state claims, which were also dismissed in the court's Order.

certiorari to resolve the disagreement" in the courts of appeals over the scope of the results test, stated that "Clements and Mallory [the conflicting appeals court decisions] both were decided on the basis of the Voting Rights Act, not the Equal Protection Clause, and thus their disagreement and its eventual resolution by the Supreme Court are not germane to the present case." Order at 31 n. 11. Plaintiffs' present motion simply repeats, without significant amplification or modification, the claim that resolution by the Supreme Court of an issue of statutory construction should determine the constitutional issue raised herein -- the justiciability of the plaintiffs' Complaint. As this court already has stated, that resolution is not germane to the present case.

The Supreme Court's opinion in Chisom confirms this court's rejection of the plaintiffs' argument. In Chisom, the Supreme Court began its legal analysis with a careful description of its holding:

> Our decision today is limited in character, and thus, it is useful to begin by identifying matters that are not in dispute. No constitutional claims are before us. Unlike Wells v. Edwards, White v. Regester, and Mobile v. Bolden, this case presents us solely with a question of statutory construction. That question involves only the scope of the coverage of § 2 of the Voting Rights Act as amended in 1982. . . .
>
> . . . The only matter in dispute is whether the test for determining the legality of

> such a practice, which was added to the statute in 1982, applies in judicial elections as well as in other elections.

Chisom, 59 U.S.L.W. at 4698 (emphases added and footnotes omitted).[2] As defendants state in their Memorandum in Opposition to Plaintiffs' Motion for Relief from Judgment, "[i]t is difficult to imagine a more emphatic statement about the limitations of a holding, limitations that the plaintiffs now ask this Court to disregard." Defendants' Memorandum at 3.

The plaintiffs' argument for having this court disregard the Supreme Court's explicit limitations on its holdings in Chisom and Houston Lawyers, Assoc. consists of the bare-bones assertion that "the Supreme Court's reasoning is applicable to the plaintiffs' claims under the First and Fourteenth Amendments in the instant case." Plaintiffs' Memorandum in Support of Motion to Extend Time for Filing Notice of Appeal and Motion for Relief from Judgment Pursuant to Rule 60(b) at 2. See also id. at 3 (stating that the "concept" of "representative" is "no different for the Fifteenth Amendment and the Voting Rights Act than for the First and Fourteenth Amendments"). The court finds plaintiffs' assertion to be unwarranted.

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[2] The Supreme Court's opinion in Houston Lawyers, Assoc. relies on Chisom's discussion of the main issue and simply notes that "[w]e granted certiorari in these cases, . . . and in Chisom v. Roemer, . . . for the limited purpose of considering the scope of the coverage of § 2." Houston Lawyers' Assoc., 59 U.S.L.W. at 4704 (emphasis added and citations omitted).

DISTRICT COURT ORDER OF JULY 29, 1991 CONTINUED . . .

The question presented in the Chisom and Houston Lawyers' Assoc. cases was whether the 1982 amendment of § 2 of the Voting Rights Act extends to state judicial elections. Prior to 1982, it was clear that § 2 did apply to such elections. Chisom, 59 U.S.L.W. at 4698. Congress enacted the 1982 amendment in response to Mobile v. Bolden, 446 U.S. 55 (1980), which had held that § 2 was coextensive with the Fifteenth Amendment, and that as a consequence a plaintiff must prove discriminatory intent in order to state a § 2 claim, just as with a constitutional claim. The 1982 amendment eliminated the need to prove discriminatory intent, and substituted a results test for identifying violations of § 2. Chisom, 59 U.S.L.W. at 4699. In Chisom, the Supreme Court rejected as "anomalous" the argument that "Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection." Id. at 4702.

Chisom and Houston Lawyers' Assoc. thus resolved an important but discrete question of statutory construction -- what was the intent of the Congress that enacted the 1982 amendment to § 2?[3] The present case involves neither the

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[3] The specific elements of the Supreme Court's analysis in Chisom reflect the purely statutory nature of its holding: the Court emphasized that neither the 1982 text nor its legislative history indicated an intent to withdraw § 2 coverage from judicial elections; that the lower court's decision holding the results test inapplicable to judicial elections resulted in "radical surgery" on the statutory text; that the purposes of the 1982 amendment make it "appropriate for § 2 . . . to continue to apply . . . to judicial elections;" and that the contrary conclusion would produce an "anomalous result" that the 1982 Congress was "unlikely to have intended

(continued...)

intent of Congress nor the application of the tools of statutory construction. This court's Order, instead, required the resolution of a constitutional question, through the application of the principles defining non-justiciable political questions.

The court perceives plaintiffs' assumption that § 2's statutory requirements must be identical to federal constitutional requirements to be unwarranted. The very purpose of the 1982 amendment to § 2 was to differentiate the Voting Rights Act's standards from those of the Constitution. See Chisom, 59 U.S.L.W. at 4702 (the "statute was enacted to protect voting rights . . . not adequately protected by the Constitution itself"). The issue of § 2 coverage that Chisom and Houston Lawyers' Assoc. decided goes to the range of situations in which Congress intended courts to apply a particular substantive test of liability; the question of justiciability concerns the type of questions the Constitution permits courts to resolve. These issues are not properly equated.

The plaintiffs have also misread the implications of Chisom and Houston Lawyers' Assoc. for the instant case.[4]

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[3](...continued)
since the Supreme Court had already held § 5 of the Voting Rights Act applicable to judicial elections. 59 U.S.L.W. 4700-01. This reasoning, directed as it is toward construing congressional intent, is clearly irrelevant to the constitutional question before this court.

[4] The plaintiffs state that "[t]hese cases do not merely hold that the Voting Rights Act applies to the election of judges; each case concluded that elected judges are not to be subject to disparate treatment compared to other elected officials." Plaintiffs' Memorandum at 4-5. This (continued...)

Rather than undermining this court's reasoning in its Order, Chisom reaffirms at least one important aspect of that reasoning. In the Order, this court relied in part on Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), aff'd summarily, 409 U.S. 1095 (1973), which held that the one-person, one-vote rule was inapplicable to the election of judges. In Chisom, the Supreme Court explicitly distinguished Wells, not by "repudiat[ing]" its reasoning, as plaintiffs suggest[5], but by stressing the difference between an equal protection claim and a Voting Rights Act claim. Chisom, 59 U.S.L.W. at 4702 ("Wells rejected a constitutional challenge based on the Equal Protection Clause of the Fourteenth Amendment." It has no more relevance to a

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[4](...continued)
statement directly contradicts the Supreme Court's own description of the issue it resolved in Chisom and Houston Lawyers' Assoc., as quoted above. See Chisom, 59 U.S.L.W. at 4698 ("The only matter in dispute" is whether the § 2 results test applies to judicial elections).

[5] Indeed, in describing Wells, the Supreme Court stated that "we have held the one-person, one-vote rule inapplicable to judicial elections," Chisom, 59 U.S.L.W. at 4702 (emphasis added), thus laying to rest any doubts about the authority of Wells stemming from the fact that Wells was a summary affirmance. Inexplicably, plaintiffs repeat their earlier assertion, that the defendants' argument -- and now by implication this Court's Order -- somehow depend on League of United Latin American Citizens Council # 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990) (en banc), rev'd, Houston Lawyers' Assoc. v. Attorney General of Texas, ___ U.S. ___ 69 U.S.L.W. 4706 (June 20, 1991), rather than on Wells. As this court observed in its Order, "[plaintiffs appear to have misread the defendants' reason for citing Clements, which was for its reading of Wells," Order at 31 n. 11 (which reading the Supreme Court agreed with in Chisom), not for its interpretation of whether or not judges are "representatives" covered by § 2.

correct interpretation of this statute than does our decision in Mobile v. Bolden, . . . which also rejected a constitutional claim."). Thus, the Court recognized that the Equal Protection Clause and the Voting Rights Act are not co-extensive and that the interpretation of the scope of one has no relevance when determining the scope of the other.

In short, the Supreme Court in Chisom and Houston Lawyers' Assoc., rather than enunciating broad principles of constitutional law, as plaintiffs suggest, confined itself to the narrow question of the interpretation of a statutory term. Thus, the court believes that its reasoning in its Order remains dispositive in interpreting plaintiffs' Fourteenth Amendment Equal Protection claim. It is the lack of responsiveness by those elected to the concerns of those they represent that justifies judicial scrutiny of elections of legislative and executive officials. In contrast, judges are not supposed to be responsive and, in that sense, cannot be said to be "representatives" for purposes of equal protection clause analysis. See, e.g., Order at 28-29. For these reasons, the Chisom and Houston Lawyers' Assoc. decisions do not warrant setting aside the judgment of dismissal entered in this action. Accordingly, plaintiffs' Motion for Relief from Judgment is hereby DENIED.[6]

SO ORDERED.

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[6] Plaintiffs' Motion for Hearing on their Motion for Relief from Judgment is also DENIED.

DISTRICT COURT ORDER OF JULY 29, 1991 CONTINUED . . .

This 29th day of July, 1991.

s/James C. Fox
JAMES C. FOX
United States District Judge

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ORDER AND DISSENT – PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

FILED: April 27, 1993

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 91-1741
(CA-88-263-5-F)

REPUBLICAN PARTY OF NORTH CAROLINA; BRUCE BRIGGS; WILLIAM R. SIGMON; MARVIN K. GRAY; R. HOWARD RIDDLE; LLOYD FOWLER; JOE R. WILSON; R. WALTER WHITE; EDGAR A. READLING, JR.; FREDERIC M. GALLAGHER; RALPH A. WALKER,

Plaintiffs-Appellants,

versus

JAMES B. HUNT, JR., Governor of North Carolina; NORTH CAROLINA STATE BOARD OF ELECTIONS; WILLIAM MARSH, JR., Chairman of North Carolina State Board of Elections; GREG O. ALLEN; M. H. HOOD ELLIS; RUTH TURNER SEMASHKO; JUNE K.

YOUNGBLOOD; NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS,

Defendants-Appellees,

and

DURHAM COUNTY BOARD OF ELECTIONS; FORSYTH COUNTY BOARD OF ELECTIONS; GUILFORD COUNTY BOARD OF ELECTIONS,

Defendants.

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Appellees have filed a petition for rehearing with suggestion for rehearing in banc and appellants filed an answer to the petition. A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Widener, Phillips and Murnaghan voted to rehear the case in banc and Judge Phillips wrote the attached dissent. Judges Russell, Hall, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig and Williams voted against rehearing in banc. Chief Judge Ervin disqualified himself from participation.

The original judicial panel voted to deny the petition for rehearing.

ORDER AND DISSENT – PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC CONTINUED . . .

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Wilkins for a panel consisting of Judge Russell, Judge Wilkins and Judge Glen M. Williams, Senior United States District Judge, sitting by designation.

For the Court

/s/Bert M. Montague
Clerk

ORDER AND DISSENT – PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC CONTINUED . . .

PHILLIPS, Circuit Judge, dissenting from denial of rehearing en banc:

In 1986, a severely divided Supreme Court in Davis v. Bandemer, 478 U.S. 109 (1986) opened a narrow door of justiciability for claims by political parties (and possibly their cross-over allies) that their group voting power had been unconstitutionally degraded by partisan political gerrymandering of legislative districts and, having opened that outer door but narrowly, opened an even narrower door for the prima facie statement and proof of such a particularized claim. Significantly, the claim initially found justiciable by a six to three majority of the Bandemer Court was then thought by four of those who had thought it justiciable (and three who disagreed on that point) not, however, proven prima facie under the more stringent substantive sufficiency test. Though discriminatory intent by the state legislature was so palpable as not to be seriously questioned, see id. at 127, 140-41 and though there was considerable evidence of adverse effect from the gerrymander upon the challenging political party's proportionate success at the polls, see id. at 134, it was not sufficient in degree to establish an equal protection violation under the Court's demanding test. See id. at 134-143.

A common theme runs through each of the three different viewpoints expressed in the four separate Bandemer opinions. Concerns of federalism and separation of powers mandate that, if they are to exist at all, the occasions for federal court consideration of claims of partisan political gerrymandering by state legislatures must be strictly confined. See id. at 129-134, 143 & n.14, (plurality opinion) (though such claims justiciable, stringent prima facie claim

test required in view of "peculiar characteristics of these political gerrymandering claims" and "the delicacy of intruding on this most political of legislative functions"); id. at 144 (Burger, J., concurring in judgment) (not justiciable; claims of "injustice" from political gerrymandering do not "belong" with federal judiciary); id. at 144 (O'Connor, J., concurring in judgment) (same; "judiciary should leave [such claims] to the legislative branch"); id. at 184-85 (Powell, J., dissenting) (though claims justiciable in general and instant one proven, difficulties of adjudicating such claims by "federal judges . . . ill-equipped generally to review legislative [districting] decisions" requires that courts "impose a heavy burden of proof" on parties making such claims).

Since Bandemer was decided in 1986 until now, neither the Supreme Court nor, I believe, any other lower federal court than ours had opened wider the narrow doors of justiciability and substantive claim defined by the Bandemer Court until the panel decision in this case. That decision has now opened both wider in ways that I believe are unwarranted under controlling Supreme Court authority. Unless corrected, the decision will work great constitutional mischief of exactly the sort recognized by every Justice who wrote in Bandemer as the special threat to federalism and separation of powers posed by this particular type of attack on state legislative functions.

I think we should do the correcting, and do it now. If we do not, and unless the Supreme Court were to undertake review of our judgment of reversal and remand at this time, the result will be to send this case back to the district court under a mandate which, with all respect, I believe is

unmanageable--precisely because it is unmoored from even the concededly uncertain moorings of Bandemer. See id. at 185 n.25 (Powell, J., dissenting) (pointing out that because of the division of views within the court "there is no 'Court' for a standard that should be applied in determining whether a challenged redistricting plan is an unconstitutional partisan political gerrymander"). In consequence, later correction, whether by this Court of the Supreme Court, will have been at the expense of a great deal of essentially unguided effort by both court and parties, one of them a sovereign state, (and possibly by that state's legislature) in a real political thicket which the district court wisely had seen was one into which it should not go. For this reason, I dissent from the court's decision not to rehear en banc the appeal in this case.

I

The first and fundamental error in our panel's decision is its reading of Bandemer's narrow justiciability holding to include claims respecting the election of state judges. I believe that, properly read, Bandemer confines the justiciability of claims of partisan political gerrymandering to those involving the election of legislative officials. While Bandemer does not expressly say so (having no need to) all the pointers on which we commonly rely are in that direction.

The prime pointer is found in the Supreme Court's only direct consideration of a constitutional voting rights claim related to the election of judges. In Wells v. Edwards, 409 U.S. 1095 (1973) the Court summarily affirmed a three-judge district court decision that the claim, there of one-

person, one-vote violation, was not a justiciable one. While such a summary affirmance does not of course foreclose later, full consideration of the dispositive issue by the Supreme Court, Bandemer, 478 U.S. at 121, the decision affirmed and its rationale are binding on this court until that happens. It has not yet. Indeed, the continued authority of Wells recently has been expressly recognized by the Supreme Court in Chisom v. Roemer, 111 S.Ct. 2354, 2368 (1991).

It therefore is presently the law of the land, hence of this circuit, that because state judges, where elected, are not elected to provide the people with "representative government," a claim that the process by which they are elected violates the constitutional one-person, one-vote principle is not a justiciable one--that principle simply being "not relevant to the makeup of the judiciary." Wells, 347 F. Supp. 453, 455-56 (M.D.La. 1972), aff'd mem., 409 U.S. 1095 (1973). I believe that Wells' rationale for the nonjusticiability of one-person, one-vote claims respecting judicial elections necessarily extends as well to the nonjusticiability of group vote-dilution claims respecting such elections. I do not see how, if having one's individual vote in judicial elections denied equal weight to that of all others in the voting constituency is not the subject of a justiciable constitutional claim, having an identifiable political group's voting power in such elections "diluted" by partisan political gerrymandering could be. The one is no more nor less relevant to "preserv[ing] a truly representative government" under the Wells rationale.

I therefore read Wells as holding directly, and by necessary implication from the rationale of the lower court

decision it affirmed, that no constitutional challenge to a state's districting decisions respecting the election of its judges could present a justiciable controversy, whether based on one-person, one-vote or on group vote-dilution grounds.

Bandemer's later holding that equal protection challenges by political parties to state districting decisions respecting the election of legislators do present justiciable controversies does not undercut this reading of Wells. It would do so only if the necessary implication of its justiciability holding was that it embraced judicial as well as legislative elections. I believe the plurality and concurring opinions on which the Bandemer holding is based instead imply the opposite: that it is limited by its rationale, by its tone, and by the precedent upon which it relies, to claims respecting legislative elections.

The Bandemer holding, an extremely cautious one on any reading, is expressly grounded in a late-developed constitutional voting rights jurisprudence that was solely concerned with the unique threat posed to truly representative government by state apportionment and districting decisions affecting the make-up of the very legislative bodies that are the indispensable core of that form of government and the ultimate instrument through which minority groups may effectively "fend [] for themselves" in the political processes of a state. Bandemer, 478 U.S. at 152 (O'Connor, J., concurring in the judgment). It is inconceivable to me that the one-person, one-vote principles of Baker v. Carr, 369 U.S. 186 (1962) and Reynolds v. Sims, 377 U.S. 533 (1964), or even the racial group vote dilution principles of White v. Regester, 412 U.S. 755 (1973) and Whitcomb v.

Chavis, 403 U.S. 124 (1971) would ever have originated in response to constitutional challenges respecting the makeup of state judiciaries. Wells of course is direct evidence that they would not have, and Bandemer's rationale, directly drawn from those seminal voting rights decisions, see Bandemer, 478 U.S. at 118-27, confirms that its holding too is totally dependent upon the fact that there too it was the make-up of legislative bodies, hence of legislative power, that was at stake. The whole tone of the Bandemer plurality opinion (and of the concurring opinion providing the justiciability holding) is one of great caution and anxiety about extending federal judicial oversight of the apportionment/districting functions of state legislatures past the few points of absolutely felt necessity--all concerned with the composition of legislative bodies--that had now been identified in Baker, White, and Bandemer. I believe it is implicit in Bandemer that it would not have been written in response to a partisan political gerrymandering challenge to a state's process for electing its judiciary.

Chisom, in which the Court recently held that amended § 2 of the Voting Rights Act did "cover" judicial elections, does not undercut this reading of Wells and Bandemer. Our panel's decision relies upon Chisom as demonstrating on the one hand that Bandemer's justiciability holding respecting legislative elections extends as well to judicial elections, see slip op. p.15, n.17, and, on the other, that Wells' nonjusticiability holding respecting judicial elections is confined to one-person, one-vote challenges, see slip op. p.17. But this reliance is, with respect, simply misplaced. Both suggestions are directly refuted or necessarily belied by the Chisom opinion itself.

As to the suggestion that Chisom's discussion of § 2 "coverage" of judicial elections "applies to claims pursued under the Equal Protection Clause," slip op. 14 n.17, the Chisom Court was at pains to disclaim any relevance of its analysis of the concededly broader reach of § 2's coverage to the reach ("justiciability") of related constitutional voting rights protections. Chisom, 111 S.Ct. at 2361, 2368.

The panel's suggestion that Chisom's recognition of Wells' continued authority on the nonjusticiability of challenges to judicial elections was confined to one-person, one-vote challenges is belied by the Chisom Court's discussion of the point. That aspect of Wells was addressed in Chisom only in response to the state-defendants' suggestion that because Wells had found one-person, one-vote claims respecting judicial elections nonjusticiable, this precluded § 2 coverage of such elections, since consideration of § 2 vote-dilution claims required an initial determination whether one-person, one-vote principles had been observed in the challenged districting plans. See Chisom, 111 S.Ct. at 2368. The Chisom Court rejected the argument by pointing out that § 2 claims of racial vote dilution could be made out irrespective of the observance of one-person, one-vote requirements. Id. n.32. This of course says nothing about the breadth of Wells' nonjusticiability holding, but simply points out the irrelevance of that holding to questions of § 2's "coverage".

A proper parsing of the Supreme Court decisions in Wells, Bandemer, and Chisom thus clearly points to the nonjusticiability of any claim by a political party that a state's districting design for election of its judges, as opposed to its legislators, violates any constitutionally secured group

voting right of the party. The only group voting rights recognized to date by the Supreme Court as entitled to constitutional protection against dilution by a state's electoral districting design--hence as potential subjects of justiciable controversies--are those of identifiable racial and political groups respecting the election of legislators. At this point, this defines the limit of constitutionally secured group voting rights, hence of justiciable constitutional claims by racial or political groups of voters. To the extent state districting designs for the election of other officials may be thought to result in unfairness or injustice to identifiable racial or political (or other?) groups of voters, rectification has been left by the Supreme Court's voting rights jurisprudence to the political processes of the states (subject always of course to Congress' constitutional enforcement powers in respect of racial groups).

Even if Bandemer's justiciability holding were construed to extend to claims respecting the election of judges, the claim here would not meet the most critical aspects of Bandemer's justiciability test: that the claim be subject to resolution by the application of "judicially discernible and manageable standards" and that its resolution not require the making of an "initial policy decision that the judiciary should not make." Bandemer, 478 U.S. at 123, 125. The Bandemer majority concluded that the partisan political gerrymandering claim there in issue could be resolved under the equal protection standards developed and applied in the one-person, one-vote and racial vote-dilution cases, id. at 123-25 and, seemingly, that the only "initial policy decisions" required to resolve the claim were ones ensuring fair representation" for identifiable groups of voters

which were not decisions "of a kind clearly for nonjudicial discretion." Id. at 125-26 & n.9. Disagreeing on this critical point, three Justices thought that racial vote-dilution standards could not properly be applied to political party claims, that nonjudicial policy determinations would be required to resolve political gerrymandering controversies. Id. at 155-161 (O'Connor, J., concurring in judgment).

Of course the Bandemer majority holding on this issue controls but, with respect, I believe that every judicial management difficulty pointed out by Justice O'Connor's concurring opinion that would result from the attempt to transpose racial vote-dilution standards to political group vote-dilution cases would be magnified past the acceptable point where, as here, the transposition would also be from claims respecting legislative districting to claims respecting judicial elections. And indeed I do not believe that the transposition could be made to the particular context of this case--North Carolina's electoral process for election of its superior court judges--without making an "initial policy decision" about the structural design of the state's judicial system that clearly is one "not for the federal judiciary to make." My reasons are as follows.

A unique, critical feature of contemporary group vote-dilution jurisprudence (the source, per Bandemer, of whatever standards would be available in this case) is that the existence of a dilution-by-districting (or failure-to-district) violation can only be determined by identifying electoral districts which would not violate the group's voting rights because in those district they would constitute effective voting majorities. A state's failure so to have districted thus

constitutes the violation, and the appropriate remedy is a requirement that it now do so. In this somewhat unusual decisional process, the availability of remedy thus effectively determines the existence of right--and its violation. See Growe v. Emison, ___ U.S. ___, ___ 61 U.S.L.W. 4163, 4168 (U.S. Feb. 23, 1993); Thornburg v. Gingles, 478 U.S. 30, 50 n.17 (1986). Critical to this process for resolving vote-dilution claims, therefore, is a court's ability to determine with sufficient precision two things: the identity of the group claiming violation of its rights--so that its numbers, hence its potential voting strength, can be determined; and the appropriate geographical areas within which its potential voting strength so calculated is to be measured.

These two interrelated proof requirements present problems difficult enough in the racial vote-dilution cases concerned with legislative districting out of which they originated. In the quite different context of a political group's vote-dilution challenge to a state's design for electing judges, I believe the problems are essentially intractable, that there are no "judicially discernible and manageable standards" for resolving them.

The problem of defining--sufficiently to count its numbers--the group claiming dilution of its voting strength in this case is that it includes, by its own definition, not just Republicans but an indeterminate number of sometime allied non-Republican voters. The reason the group so defines itself is obvious: only so could it identify a significant number of appropriately configured judicial districts in which the group would constitute effective voting majorities. It is true that Bandemer held that racial group vote-dilution

standards could be applied to political group claims notwithstanding the latter group could not be identified as could a racial group by the immutability of its members' defining characteristic. Bandemer, 478 U.S. at 125. But nothing in Bandemer denies the increased difficulty which this element of indeterminacy creates for identifying, in order to number its members, a political group claiming vote dilution. Indeed, the Bandemer Court expressly noted the difficulty but was able to avoid addressing and giving guidance on it by its decision to dismiss the claim on the merits. See id. at 134-35 & n.15. In consequence, because the problem has not been presented in racial vote-dilution cases and has been avoided in the Supreme Court's one political vote-dilution decision, there is presently no authoritative guidance upon it for the base-line federal courts.

The basic difficulty thus unaddressed is of course obvious: how does a court determine the consistently reliable voting strength of a political party's non-party voting allies for particular electoral offices? Obviously there are some voting record data from which inferences may be attempted (claimants here point to judicial district primary election records) but these are fraught with proof problems, (e.g., how many elections? occasional allies or only "true believers"?) see id., and the inferences possible, if allowable at all, are a far cry from the exactitude possible in the racial vote-dilution cases that supply the only available standards.

In this case, the indeterminacy of group identity, hence voting strength, is exacerbated by comparable or even greater indeterminacy with respect to the other, interrelated element in the dilution equation, the geographical areas

within which voting strength is to be measured. Indeed, the geographical area problem in this case, unlike that in legislative districting cases, is judicially unmanageable in the ultimate sense: it cannot be resolved except by making an "initial policy decision"--here one concerning the basic structure of a state's judicial system--that is "not for judicial decision".

To show why requires a brief analysis of the exact vote-dilution claims in issue, and of the way it impacts under vote-dilution jurisprudence on the state's judicial system. The claim here is actually an attack on the state's at-large design for the election (as opposed to primary nomination) of its superior court judges. The remedy sought is the classic one that has evolved in voting rights jurisprudence for successful challenges to at-large and multi-member district electoral designs: require election by districts in some of which the otherwise "submerged" groups constitute effective voting majorities.

Identifying appropriate remedial districts for local or state legislative elections can of course present very difficult judicial problems whose resolution has serious impact on a state's electoral processes and on the immediate racial or political-party makeup of the legislative body. See e.g., Gingles. But in the end, that is the extent of such a remedy's impact: it doesn't affect any fundamental state policy respecting the very structure of its legislative bodies--whether they shall be unicameral or bicameral, the qualification for holding the offices, or the like.

Not so with respect to the impact of the judicial districting remedy sought here. A decision that North Carolina must abandon its historic process of state-wide election of its superior court judges would affect not just that electoral process and the immediate political party mix of these judgeships, but a critical structural feature of the state's judicial system. Central to that structure since 1875 has been the constitutional provision for the "rotation" of superior court judges for sittings over a wider territory than that of their districts of residence. N. C. Const. Art. IV, § 9. This fundamental policy--asserted in the Constitution as a "salutary one that should be continued", id.--is based on a perception that the justice system will be best served by delocalizing these trial courts of general jurisdiction--specifically to minimize the accumulating influence of local connections upon the judges. This is a unique structural feature rarely found in state court systems. Whatever one may think of its merits, it represents a fundamental policy choice respecting the structure of this critical trial-level component of the state's judicial system. Critical to its implementation is the companion choice to let the voters of the entire state rather than just those of a judge's district of residence (the nominating constituency) participate in the election of those judges. While it is of course technically possible to retain the rotation system without state-wide election, the two are so intimately related in concept that it is difficult to believe that the rotation system could be thought any longer justified

if voters in the wider area of rotation were not allowed to participate in the selection of these judges.[1]

Consequently, a complete localizing of this electoral process would be tantamount, as a practical matter, to the rejection of so critical a feature of the rotation system that the policy's abandonment in time would likely be assured. Such a remedy therefore would affect North Carolina's constitutional organization of its judiciary--a "decision of the most fundamental sort for a sovereign entity", Gregory v. Ashcroft, 111 S.Ct. 2395, 2400 (1991) (age-qualification for state judicial offices that might well be invulnerable to the limitations on state power imposed by the Fourteenth Amendment. Id. at 2405. Surely it represents at least an initial policy decision of the sort "not for judicial discretion" that epitomizes the nonjusticiable political question.

There is yet one more problem of "discernible and manageable judicial standards" to be considered in this case that might well alone determine its nonjusticiability. Resolution of the Republican Party's vote-dilution claim here would take place in the context of North Carolina's recent realign-

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[1] Though under the state constitution rotation could be statewide, the state legislature is empowered to provide for less extensive areas of rotation within judicial divisions of its creation. Responding to increased dockets and other factors affecting the logistics of rotation, the legislature over time has increased the divisions from two to the present four, thereby cutting back the rotation areas from roughly half the state to a fourth. This of course simply further complicates the problem of identifying the appropriate geographical areas for measuring group voting strength in this case. As claimants here point out, the state might have an argument at least for division-wide elections if not for state-wide.

ment of judicial districts in response to a Voting Rights Act suit--to create a number of "safe" black voter majority districts for purposes of primary nomination. As Justice O'Connor pointed out in her Bandemer concurrence, one inevitable consequence of opening the door to vote-dilution claims by political parties in addition to those by racial groups would be an "increase in the number of competing claims to equal representation [that] will make judicial review . . . vastly more complex." Bandemer, 478 U.S. at 156. That added complexity is absolutely guaranteeable in this case were it to be allowed to proceed further. Indeed it is difficult to imagine how a court would approach the problem of accommodating the inevitable claims of black voters at least to retain the "safe" nomination districts recently created in response to their Voting Rights Act suit, with the competing claims of the Republican Party for "safe" districts for final election purposes in this case. The effort is sufficiently mind-boggling to demonstrate on that account alone the absence of judicially manageable standards for the task.

II

Even if political party claims of vote dilution respecting judicial elections were justiciable, the claim here should have been dismissed for substantive insufficiency. The panel decision erred in finding the claim as stated a cognizable one under the substantive test laid down in Bandemer. That test, avowedly a more stringent one than that applied in other equal protection contexts, see Bandemer, 478 U.S. at 134 n.14, would find unconstitutional discrimination through partisan political gerrymandering only when an "electoral system is arranged in a manner that will

consistently degrade a voter's or a group of voters' influence on the political process as a whole." Id. at 132 (emphasis added). By this test, the court expressly sought to confine judicial intrusions into this "most political of legislative functions", id. at 143, to only those cases in which a challenged districting plan is alleged to have had, or immediately to threaten, effects "sufficiently serious to require intervention by the federal courts." Id. at 134.

Bandemer's rejection of the claim in that case, and the Court's discussion of the test it applied, make plain the only situation it would think "serious" enough to "require" such judicial intervention. It would exist only where a partisan political gerrymandering process had worked, or assuredly soon would work, an effective destruction of the power of the affected minority political party even to "influence" the political processes of the state to the point of insuring responsiveness to its interests on the part of majority party legislators. See id. at 131-32. Because only in that dire situation could it be assumed that the minority political group had effectively lost its power any longer to protect itself through the voting franchise, only that situation is serious enough to warrant judicial intervention to insure equal protection with respect to laws affecting exercise of that franchise. Critical to the existence of such a drastic situation is that the degradation of the minority political group's influence on the political process must extend to that "process as a whole." See id. at 132, 143.

As the panel decision implicitly recognizes, dramatic successes in state-wide elections by the North Carolina Republican Party (and its cross-over allies) in recent years

would make meeting this requirement impossible if "as a whole" refers to the whole range of the state's political processes. See slip op. pp.22-23 (noting that Republican candidates had won election as Governor in three of the last five elections, as United States Senator in four of the last seven, presently hold four of the state's eleven seats in the United States House of Representatives, and have had other successes in state-wide elections).

The panel avoids the consequence of such a literal reading by dismissing it in a footnote aside. Id. at 20, n.24. Citing no decisional authority in support, the panel holds that "as a whole" in the Bandemer formulation refers narrowly only to the "whole" of an electoral process under specific challenge, here that for electing the state's superior court judges. Id.

That reading, with all respect, is wholly at odds with Bandemer's description of the degree of degradation of a political party's voting power from partisan political gerrymandering that is serious enough to warrant federal judicial intervention. So far as I know, it stands alone among the decisions that have considered the matter. Indeed, the Supreme Court recently and in rapid order has summarily affirmed three three-judge court decisions expressly rejecting this narrow reading of the critical phrase, "as a whole". Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992) (three-judge court), aff'd mem. ____ U.S. ____, 113 S.Ct. 30 (Oct. 5, 1992); Fund for Accurate and Informed Representation, Inc. v. Weprin, 796 F. Supp. 662, 668-69 (N.D.N.Y. 1992) (three-judge court), aff'd mem. ____ U.S. ____, 113 S.Ct. 650 (Dec. 7, 1992); Badham v. Eu, 694 F. Supp. 664, 670-

71(N.D.Cal. 1988) (three-judge court), aff'd mem. 488 U.S. 1024 (1989); see also Holloway v. Hechler, ___ F. Supp. __, Civ. No. 2:92-0081 (S.D.W.Va. September 29, 1992) (three-judge court), aff'd mem., _____ U.S. _____, 61 U.S.L.W. 3596, No. 92-1194 (March 1, 1993).

I do not believe that Bandemer contemplated federal court intervention in behalf of a political party as demonstrably capable of fending for itself in a state's political processes as is the contemporary Republican Party in North Carolina. That it may have been unable--even if by intentional thwarting of its efforts--to elect candidates for judgeship on one trial court in the state's judicial system is not the type of egregious effect on its general power to influence the overall political processes of the state that Bandemer required.

III

In summary.

The only claims of group vote-dilution by districting that present justiciable controversies rather than nonjusticiable political questions are claims by racial groups, or by political parties respecting legislative elections. Claims by political parties of vote-dilution respecting judicial elections are not justiciable. This is the import of the holdings in Wells and Bandemer. The claim in this case should have been dismissed--as it was by the district court--on that basis.

Even if vote-dilution claims respecting judicial elections may, like those respecting legislative elections, be

sometimes justiciable under Bandemer's rationale, the articular claim in this case is not. Due to the particular nature of the claim and of the challenged electoral process, there are no "judicially manageable standards" to determine with sufficient precision either the identity of the political group seeking relief or the appropriate geographical areas (judicial districts) within which to measure its group voting strength. Furthermore, resolving the claim against the state would require a federal court to make an initial policy decision respecting the state's organization of its judicial system that is not for the judiciary. Finally, the complexities resulting from the need in adjudicating this political group's dilution claim to accommodate the necessarily conflicting voting rights of black voters respecting the offices in question would in themselves defy the application of judicially manageable standards.

Even if such claims may in particular circumstances be justiciable and if in this circumstance the claim was justiciable, it should have been dismissed for failure to state a claim under Bandemer's substantive test. It did not allege--could not allege--a sufficient degradation of the Republican Party's "influence on the political process as a whole" to warrant federal court intervention to insure fairer representation of Republicans in the office of state superior court judge.

RELEVANT PORTIONS OF THE CONSTITUTION OF NORTH CAROLINA, ARTICLE IV

Sec. 2. General Court of Justice.

The General Court of Justice shall constitute a unified judicial system for purposes of jurisdiction, operation, and administration, and shall consist of an Appellate Division, a Superior Court Division, and a District Court Division.

Sec. 9. Superior Courts.

(1) *Superior Court districts.* The General Assembly shall, from time to time, divide the State into a convenient number of Superior Court judicial districts and shall provide for the election of one or more Superior Court Judges for each district. Each regular Superior Court Judge shall reside in the district for which he is elected. The General Assembly may provide by general law for the selection or appointment of special or emergency Superior Court Judges not selected for a particular judicial district.

(2) *Open at all times; sessions for trial of cases.* The Superior Courts shall be open at all times for the transaction of all business except the trial of issues of fact requiring a jury. Regular trial sessions of the Superior Court shall be held at times fixed pursuant to a calendar of courts promulgated by the Supreme Court. At least two sessions for the trial of jury cases shall be held annually in each county.

(3) *Clerks.* A Clerk of the Superior Court for each county shall be elected for a term of four years by the qualified voters thereof, at the same time and places as members of the General Assembly are elected. If the office of Clerk of the Superior Court becomes vacant otherwise than by the

expiration of the term, or if the people fail to elect, the senior regular resident Judge of the Superior Court serving the county shall appoint to fill the vacancy until an election can be regularly held.

Sec. 10. District Courts.

The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected. For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint for a term of two years, from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law. Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office.

RELEVANT PORTIONS OF THE CONSTITUTION OF NORTH CAROLINA, ARTICLE IV CONTINUED . . .

Sec. 11. Assignment of Judges.

The Chief Justice of the Supreme Court, acting in accordance with rules of the Supreme Court, shall make assignments of Judges of the Superior Court and may transfer District Judges from one district to another for temporary or specialized duty. The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed. For this purpose the General Assembly may divide the State into a number of judicial divisions. Subject to the general supervision of the Chief Justice of the Supreme Court, assignment of District Judges within each local court district shall be made by the Chief District Judge.

Sec. 12. Jurisdiction of the General Court of Justice.

(1) *Supreme Court.* The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. The jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" shall be the same exercised by it prior to the adoption of this Article, and the Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts. The Supreme Court also has jurisdiction to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission.

(2) *Court of Appeals.* The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.

RELEVANT PORTIONS OF THE CONSTITUTION OF NORTH CAROLINA, ARTICLE IV CONTINUED . . .

(3) *Superior Court.* Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State. The Clerks of the Superior Court shall have such jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable in every county of the State.

(4) *District Courts; Magistrates.* The General Assembly shall, by general law uniformly applicable in every local court district of the State, prescribe the jurisdiction and powers of the District Courts and Magistrates.

(5) *Waiver.* The General Assembly may by general law provide that the jurisdictional limits may be waived in civil cases.

(6) *Appeals.* The General Assembly shall by general law provide a proper system of appeals. Appeals from Magistrates shall be heard de novo, with the right of trial by jury as defined in this Constitution and the laws of this State.

Sec. 16. Terms of office and election of Justices of the Supreme Court, Judges of the Court of Appeals, and Judges of the Superior Court.

Justices of the Supreme Court, Judges of the Court of Appeals, and regular Judges of the Superior Court shall be elected by the qualified voters and shall hold office for terms of eight years and until their successors are elected and qualified. Justices of the Supreme Court and Judges of the Court of Appeals shall be elected by the qualified voters of

RELEVANT PORTIONS OF THE CONSTITUTION OF NORTH CAROLINA, ARTICLE IV CONTINUED . . .

the State. Regular Judges of the Superior Court may be elected by the qualified voters of the State or by the voters of their respective districts, as the General Assembly may prescribe.

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No. 92-2045

Supreme Court, U.S.
FILED
JUL 23 1993

In The Supreme Court Of The United States

OCTOBER TERM, 1992

JAMES B. HUNT, JR.,
GOVERNOR OF NORTH CAROLINA, et al.,
Petitioners,

v.

REPUBLICAN PARTY OF
NORTH CAROLINA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Since the reestablishment of Democratic party control over state politics after the Civil War, North Carolina has maintained a unique method of selecting its superior court judges. Candidates are nominated in party primaries from local judicial districts but are thereafter elected in partisan, statewide general elections. The use of this election method intentionally submerges Republican voters in the statewide Democratic majority. At the time this suit was brought, no Republican had been elected superior court judge in this century. In a federal court challenge to this discriminatory election structure, the following questions are presented:

1. Is a challenge to the state's method of electing superior court judges under the Equal Protection Clause of the Fourteenth Amendment barred by considerations of justiciability merely because the public officials elected are judges?

2. Is a complaint sufficient, under Davis v. Bandemer, to state an Equal Protection claim when it alleges, inter alia, that the discriminatory voting customs, practices, and procedures:

   (a) were established and are maintained with the intent and for the purpose of consistently degrading the influence of Republican voters on the political process as a whole;

   (b) have the effect of denying Republican voters an equal opportunity to elect judicial candidates of their choice;

   (c) have resulted in the virtual exclusion of Republicans from superior court judgeships for more than eight decades;

(d) have almost eliminated Republican candidate recruitment for superior court judgeships because of the widespread recognition that a campaign is hopeless and there is a resulting inability to raise campaign funds; and

(e) are an integral part of an overall political structure established and maintained by the state which consistently degrades the influence of Republican voters on the political process as a whole?

3. Is plenary consideration by this Court, before trial on the merits, appropriate when, as the Court of Appeals noted, "our conclusion that the [Republican Party of North Carolina] has set forth sufficient allegations of a violation of the Fourteenth Amendment to survive a motion to dismiss for failure to state a claim, we emphasize, is narrow and wholly dependent upon the egregious nature of the alleged systemic discrimination"?

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N.C. Const., art. IV, § 12(3) 8

N.C. Const., art. IV, § 16 19

N.C. Gen. Stat. § 163-140.1 22

N.C. Gen. Stat. § 7A-45 3

U.S. Const. amend XIV . . . . . passim

U.S. Const. amend XV 3, 15, 17

Other

Lefler and Newsome, North Carolina, The History of a Southern State (1973) 23

R. Dixon, Democratic Representation, Reapportionment in Law and Politics (1968) 14

State Court Organization, 1987, Tables 7 and 20 (1988) (National Center for State Courts) 5

V.O. Key, Southern Politics in State and Nation, (1949) 24

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

JAMES B. HUNT, JR.,
GOVERNOR OF NORTH CAROLINA, ET AL.

Petitioners,

v.

REPUBLICAN PARTY OF NORTH CAROLINA, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

I. INTRODUCTION.

The procedure by which North Carolina elects its 82 superior court judges is indisputably unique among the states.[1] As a result, this case, while important to the parties, is limited to its peculiar facts and has little or no national legal significance warranting additional appellate review.

In North Carolina, nominees for superior court judge are selected in closed party primaries in local judicial districts, but must then run in a partisan statewide general

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[1] See Petition for Writ of Certiorari (hereinafter "Pet."), 7-8 n.8.

election. As noted infra at p. 5, the Petitioners ("NCSBE") concede that there is no statutory authority for the practice of nomination by local judicial district.[2]

Republican voters[3] comprise a voting majority in several judicial districts. In those districts, Republican voters routinely elect candidates for judicial offices that are nominated and elected solely in those districts, such as district court judges, district attorneys and clerks of court. At the same time, these Republican voters also provide local majorities for Republican candidates for superior court judge, but those local Republican majorities are predictably submerged and cancelled by the overall statewide Democratic majority. At the time of the filing of this lawsuit, because of the statewide general election procedure and other systematic discrimination against Republican voters, no Republican nominee had ever been elected to the office of superior court judge in modern times.

Given this stark pattern of consistent electoral defeat, political or racial minorities have brought three federal court challenges to the structural vote dilution inherent in this statewide election scheme. The first challenge, Holshouser v. Scott, 335 F. Supp. 928, 932-3

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[2] In fact, plaintiffs' complaint alleges that local nomination districts are part of a discriminatory scheme that is intended to and has the effect of degrading the influence of Republican voters on the political process as a whole. Complaint ¶ 27, appearing in the Appendix to this brief (hereinafter "App.") at 14a.

[3] Republican voters, as defined in ¶ 2 of the Complaint, App. 4a, include registered Republicans and those voters who, although not registered as Republicans, predictably vote for Republican candidates for superior court judge. Registered Republicans comprise 26% of registered voters. Republican nominees for superior court judge regularly command over 46% of the statewide vote. Complaint ¶ 32, App. 16a.

(M.D.N.C. 1971), aff'd mem., 409 U.S. 807 (1972), decided that the one person, one vote rule does not apply to the state judiciary and, in the absence of arbitrary and invidious action or distinctions between citizens and voters, the mere showing of a disparity in the population of the nomination districts is not sufficient to void the challenged procedure.

In 1987, African-American voters challenged the statewide election procedure under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. Alexander v. Martin, No. 86-1048-CIV-5 (E.D.N.C. Nov. 25, 1989). In direct response to that challenge, the state eliminated eight appointed Republican superior court judges[4] and created eight new nomination districts in which African-American citizens constituted a majority of the voting age population. Chapter 509 of the North Carolina Session Laws of 1987 ("Chapter 509"). Upon passage of this Act, the claims of the African-American community were settled by consent.

Because Chapter 509 maintained the politically discriminatory statewide general election procedure, the Republican Party of North Carolina and Republican voters ("RPNC"), the Respondents herein, filed this Equal Protection challenge, relying upon the pleading and evidentiary standards established by this Court in Davis v. Bandemer, 478 U.S. 109 (1986), and satisfying the proof of invidious discrimination foreshadowed by Holshouser.

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[4] Prior to 1987, eight special superior court judges were appointed by the governor, then a Republican. See N.C. Gen. Stat. § 7A-45, repealed by Chapter 509 of the Session Laws of 1987.

A unanimous panel of the United States Court of Appeals for the Fourth Circuit held that, under the unique facts of this case,

> [o]ur conclusion that the RPNC has set forth sufficient allegations of a violation of the Fourteenth Amendment to survive a motion to dismiss for failure to state a claim, we emphasize, is narrow and wholly dependent on the egregious nature of the alleged systemic discrimination.

Republican Party of North Carolina v. Martin, 980 F.2d 943, 958 (4th Cir. 1992); Appendix to Petition (hereinafter "Pet. App.") 33a. Defendants petitioned for rehearing and suggested rehearing in banc. Both were denied, by a vote of 8-3.[5] The instant Petition presents no new issues or principles of widespread application and should be denied.

II. STATE CONSTITUTIONAL AND STATUTORY BACKGROUND

Article IV, Section 16 of the Constitution of North Carolina directs that the "qualified voters" elect superior court judges for eight-year terms and provides that superior court judges may be elected by the qualified voters of the state, or by the voters of their districts, as determined by

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[5] Chief Judge Ervin disqualified himself from participating. Pet. App. 86a. Judge Phillips wrote a dissent in which no other judge joined. The Petitioners seek to bolster their argument here by the erroneous (but oft repeated) statement that the two other judges who voted for rehearing joined in his dissent. See Pet. 5, 14 n.11, 15 n.12, 19, 30.

the General Assembly.[6] Since 1875, despite this constitutional ability to choose election by districts, the General Assembly has determined that superior court judge elections must be statewide. North Carolina stands in stark relief as the only jurisdiction that elects trial judges of general jurisdiction by statewide vote. See State Court Organization, 1987, Tables 7 and 20 (1988) (National Center for State Courts). See also Pet. 7-8 n.8.

Since the adoption of partisan primaries by the Democratic-dominated General Assembly in 1915, the North Carolina State Board of Elections has implemented and maintained a system of local district primaries, although there is no statutory authority for this practice. See Martin, 980 F.2d at 947; Pet. App. 5a n.6. Candidates in the general election thereafter run on a statewide basis.

Article IV, § 9(1) of the North Carolina Constitution requires the General Assembly to "divide the State into a convenient number of superior court judicial districts . . ." The counties of the State of North Carolina are organized into four judicial divisions which, until 1987, were divided into a total of 34 judicial districts. Each division and judicial district then contained one or more counties and one or more resident superior court judges. Most of those judicial districts encompassed more than one

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[6] As is discussed more fully at pp. 11-13 infra, this constitutional choice between statewide and district elections effectively disposes of the Petitioners' arguments that there are no manageable standards for the selection of election districts, that the state has made a fundamental policy decision about the structure of its institutions which cannot be reviewed by a federal court and that the Court of Appeals' decision somehow infringes upon the principles of federalism. The people of North Carolina, every time they have had the opportunity to speak to the issue, have recognized district election of judges as a method of equal dignity to statewide election. In fact, from 1872-75, superior court judges were chosen by district election.

county and all districts followed county boundary lines. Seventeen of the judicial districts had more than one judge and those districts had 43 of the 60 resident superior court judges.

In 1987, African-American citizens brought a suit alleging that the system of electing superior court judges statewide had the purpose and effect of abridging non-white voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and of the Fourteenth Amendment. That litigation ended by a consent decree upon adoption by the General Assembly of Chapter 509. See Alexander v. Martin, No. 86-1048-CIV-5.

Pursuant to Chapter 509, eight of the then-existing judicial districts were divided into 26 subdistricts, solely to create eight nomination districts for African-Americans. In forming these new districts, counties frequently were split, and some districts now consist of bits of more than one county. Sixteen of the new judicial districts do not contain a courthouse and have no separate clerk of court, public defender, district court judge or other officials associated with traditional judicial districts, except for the resident superior court judge nominated therein. As a result, these new judicial districts have no role in the administration of justice and serve only as local partisan nomination districts.[7] See Complaint ¶ 20, App. 11a.

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[7] These districts were also designed to include an incumbent Democratic superior court judge in each district and to place existing Republican superior court judges (who had been appointed by the then-Republican governor to fill vacancies) into districts in which they did not reside and would thereby be ineligible to run for election. See Complaint ¶ 12, App. 8a-9a. That configuration, coupled with continued statewide election, is further evidence of the defendants' intent to perpetuate the Democratic dominance of the superior court judiciary.

During consideration of Chapter 509, Republican legislators offered amendments (which were supported by the then-Republican Governor) that would have eliminated the statewide election of resident superior court judges and, instead, would have provided for district election. Such district election would have remedied the degradation of both Republican and African-American voting strength. The Democratic majority, however, defeated all such amendments on party-line votes. On at least eight occasions since 1961, Republican members of the legislature have introduced and sought passage of various types of legislation to provide for district-based (or division-based) elections for superior court judges. The overwhelmingly Democratic General Assembly has defeated each effort. The Democratic majority defeated these bills and amendments to cancel out or minimize any opportunity for a Republican nominee to be elected to a superior court judgeship. See Complaint ¶ 21, App. 12a.

Before the enactment of Chapter 509, eight special superior court judges, who were appointed rather than elected (and, therefore, could be Republicans when there was a Republican governor), were available to hold court in districts where court overload or protracted or sensitive litigation required assistance from outside judges. Chapter 509, however, eliminated these judgeships, each of which was then held by a Republican.

The North Carolina Constitution mandates that, after they are elected, superior court judges rotate among the judicial districts in their respective judicial divisions. Rotation of superior court judges has been cited by the NCSBE as its principal "rational" justification for statewide

elections.[8] Pet. 3. From October 1, 1990, to April 1, 1991, however, the constitutionally required, and much vaunted, "rotation" feature was suspended by the North Carolina Administrative Office of the Courts.

In addition to mandated rotation, the Chief Justice may assign superior court judges to hold court outside their divisions, N.C. Const., art. IV, § 11, as these judges have statewide jurisdiction. N.C. Const., art. IV, § 12(3). Such assignment out of division is rare and only three percent of all assignments were out of division in the seven years before the filing of this action.

Only one Republican candidate for superior court judge has been elected in this century. The election of Republican Howard E. Manning, Jr., in November 1988, occurred one year after the filing of this action. No Republican has been elected since the District Court dismissed the action.[9]

In contrast to the election of superior court judges, state district court judges are elected within the judicial district in which they serve, even though they, too, have statewide jurisdiction. N.C. Const., art. IV, § 11. Between 1968 and 1986, the voters of nine judicial districts have elected Republican candidates for District Court judge in these district-wide elections. In the same time period, Republican candidates for superior court, Court of Appeals judgeships and state supreme court justices have out-polled

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[8] The constitutional requirement of rotation applies regardless of how judges are selected. Further, rotation cannot justify statewide election because the constitutional rotation is within judicial division, not statewide.

[9] There has been no election since the decision of the Court of Appeals.

their opponents in at least 14 judicial districts. On the plaintiffs' motion for preliminary injunction, their experts offered evidence that, if the superior court judgeships elections were conducted on a district, rather than statewide basis, Republican voters would have sufficient cohesive voting strength to elect Republican superior court judges in at least seven existing judicial districts.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THAT THE PLAINTIFFS' CLAIMS PRESENT A JUSTICIABLE CASE UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IN ACCORDANCE WITH THE CONTROLLING DECISION OF DAVIS V. BANDEMER.

A. Well-Developed and Familiar Judicial Standards Exist to Analyze Fourteenth Amendment Challenges to Elections in General.

In Davis v. Bandemer, 478 U.S. 109 (1986), this Court examined a claim that the legislative apportionment scheme in the State of Indiana diluted the votes of Democrats in violation of the Equal Protection Clause of the Fourteenth Amendment. Confronted with the question of the power of the courts to entertain a claim of political gerrymandering, this Court relied on decisions in which it

had adjudicated claims of racial gerrymandering[10] and concluded, in general terms, that a complaint of vote dilution "by a political group, rather than a racial group, does not distinguish it in terms of justiciability." 478 U.S. at 125.

Thus, despite the protests of the NCSBE, the issue of justiciability of claims of political gerrymandering has been decided, and this Court has recognized that Equal Protection claims properly may be advanced by political groups. The Fourth Circuit's determination that the complaint of the RPNC presented justiciable claims is entirely consistent with Bandemer.

The justiciability argument of the NCSBE is twofold: (1) the absence of judicially manageable standards to fashion a remedy should render this case non-justiciable, and (2) the Bandemer justiciability holding cannot be applied to a challenge outside the context of elected "representatives." These very points were rejected by the Court of Appeals and do not merit further review here.

The Court of Appeals properly examined the relevant criteria specified by this Court in Baker v. Carr, 369 U.S. 186 (1962), as did the six-justice Bandemer majority, and resolved that, in this case, the issues are not ones for resolution by a coequal branch of government, there is no risk of embarrassment or disturbance if the case is adjudicated and, because this Court has articulated

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[10] Justice White, author of the Bandemer analysis, recently noted, "Although Davis [v. Bandemer] involved political groups, the principles were expressly drawn from the Court's racial gerrymandering cases. See 478 U. S., at 131 n.12 (plurality opinion)." Shaw v. Reno, No. 92-357, 1993 WL 224459 at *22 n.3 (U.S. June 28, 1993) (White, J., dissenting). This observation is not disputed and was not affected by the majority opinion in Shaw.

guiding standards by which to resolve the issues presented, none of the other identifying characteristics of a "political question" case is present. Martin, 980 F.2d at 951; Pet. App. 13a-14a.

The NCSBE relies upon only one of the six factors identified in Baker, asserting that the lack of "recognized and judicially manageable standards" renders this case non-justiciable and that "a decision in the plaintiffs' favor necessarily would involve making a policy decision about the appropriate structure of the state's judicial elections."[11] Pet. 10-11. The Circuit Court rejected this argument, recognizing that "judicial standards under the Equal Protection Clause are well developed and familiar." Martin, 980 F.2d at 951; Pet. App. 15a, citing Bandemer and Baker.

Furthermore, the Circuit Court recognized that objections based upon speculations regarding a remedy are premature. "[Q]uestions pertaining to the goals and justifications offered by NCSBE for its scheme of electing superior court judges are not presently before us because they are not relevant to whether RPNC has stated a claim upon which relief may be granted." Martin, 980 F.2d at 953; Pet. App. 19a-20a. Even if, upon a finding of a violation, the legislature defaulted in its duty to remedy that

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[11] In contrast, federal courts in North Carolina have adjudicated Fourteenth Amendment challenges to state election statutes and procedures despite their inevitable impact on judicial elections. See Hendon v. North Carolina State Bd. of Elections, 633 F. Supp. 454 (W.D.N.C. 1986) (ballot counting rules); Greaves v. State Bd. of Elections, 508 F. Supp. 78 (E.D.N.C. 1980) (ballot access); North Carolina Socialist Workers Party v. North Carolina State Bd. of Elections, 538 F. Supp. 864 (E.D.N.C. 1982) (ballot access); New Alliance Party v. State Bd. of Elections, 697 F. Supp. 904 (E.D.N.C. 1988) (ballot access); Clayton v. North Carolina State Bd. of Elections, 317 F. Supp. 915 (E.D.N.C. 1970) (electioneering rules).

violation and the District Court was thereby compelled to fashion a remedy, the non-dilutive remedy sought by the RPNC (district-based elections) is specifically authorized by the North Carolina Constitution.[12] As a result, requiring elections on that basis would not involve any policy choice by the district court that has not already been approved by the people of North Carolina. The NCSBE's ominous assertion that relief, if ordered in this case, would result in a fundamental reconstruction of the state's judicial organization, Pet. 24-25, is baseless hyperbole, particularly given the express approval of the plaintiffs' form of relief in the state constitution.[13]

B. The Election of Judges is Analytically and Practically No Different From Any Other Election.

NCSBE's attempt to distinguish judges from other government representatives for gerrymandering purposes is equally unavailing. Throughout this litigation, the NCSBE has created a false dichotomy between the function of judges and other elected officials which should not divert the Court from appropriate constitutional analysis. While the NCSBE would limit constitutional protections to the context of elected representatives only, this Court has established that "the guarantee of equal voting strength for each voter applies in all elections of governmental officials. . . ." Hadley v. Junior College Dist. of Metro. Kansas City, Mo., 397 U.S. 50, 58 (1970).

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[12] See N.C. Const., art. IV, § 9(1).

[13] Moreover, the state itself readily consented to the creation of minority nomination districts in obtaining a settlement of Alexander v. Martin, evincing its recognition of that traditional means of remedying dilutive election mechanisms.

In Hadley, voters brought a Fourteenth Amendment challenge to the apportionment of local districts for the election of "trustees" who "conduct and manage the necessary affairs" of junior colleges. Because the trustees performed "important governmental functions," the voters were entitled to protection under the Fourteenth Amendment:

> This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. While the particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions. Thus in the case now before us, while the office of junior college trustee differs in certain respects from those offices considered in prior cases, it is exactly the same in the one crucial factor -- these officials are elected by popular vote.
>
> When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional

> distinctions should be drawn on the basis of the purpose of the election.

397 U.S. at 54-55 (footnote omitted).

As in the present case, the Hadley defendants attempted to avoid the plaintiffs' claims by raising the spurious distinction between elected officials who performed legislative duties, on the one hand, and those who performed other governmental functions, on the other hand. This Court forcefully rejected that argument, holding:

> whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election. . . .

397 U.S. at 56.

Although Hadley was a "one person, one vote case," the basic challenge there, as here, was to the denial of the "equal opportunity to participate" in the election of superior court judges. As one commentator has noted in this context: "If any set of offices, including judicial offices, is made elective, thus creating expectation of direct citizen control over the officers, how can it be just to give some voters more influence than others by the device of malapportionment?" R. Dixon, Democratic Representation, Reapportionment in Law and Politics 564 (1968) (emphasis in original). The premise of the NCSBE, if adopted, would sanction a legally and logically untenable result, permitting the state to maintain an invidiously discriminatory electoral system for the selection of any and all public

officials who are not legislators.[14] Such a conclusion falls far short of the constitutional necessity reinforced by Bandemer, that of equal voting power.

Two cases decided by this Court under the Voting Rights Act, 42 U.S.C. § 1973, Chisom v. Roemer, ___ U.S. ___, 111 S. Ct. 2354 (1991) and Houston Lawyers' Association v. Attorney General of Texas, ___ U.S. ___, 111 S. Ct. 2376 (1991), provide an authoritative definition and analysis of the term "representative" as used in the voting rights context.[15]

There, in the context of a Voting Rights Act claim, the Court reasoned that the term "representatives" describes "the winners of representative, popular elections."

> If executive officers, such as prosecutors, sheriffs, state attorneys general, and state treasurers, can be considered "representatives" simply because they are chosen by popular election, then the same reasoning should apply to elected judges.

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[14] In North Carolina, such a group would include not only judges, but also elected clerks of court, registers of deeds, sheriffs and other elected state officials, none of whom is a representative in the legislative sense. See Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990).

[15] The RPNC readily acknowledges that both of these cases were decided on statutory grounds. It would, however, be wholly inconsistent to hold that judges are "representatives" for purposes of the Voting Rights Act, which was passed to effectuate the commands of the Fifteenth Amendment, see Chisom v. Roemer, ___ U.S. ___, 111 S. Ct. 2354, 2362 (1991), but not for purposes associated with other constitutional amendments similarly invoked to protect the fundamental right to vote.

___ U.S. ___, 111 S. Ct. 2354 at 2366.[16]

The unequivocal and expansive reading of the term "representative" (making it synonymous with "elected governmental official," as this Court presaged in Hadley) should be applied to this case to effectuate -- and not to defeat -- the plaintiffs' fundamental right to vote. Surely if the method of electing a state's judiciary is subject to a challenge pursuant a congressional statute, it is also subject to challenge under the Fourteenth Amendment.

C. The Inapplicability of the "One Person, One Vote" Principle to the Election of Judges is a Question of Remedy, Not of Justiciability.

The Respondents recognize that, under Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), aff'd, 409 U.S. 1095 (1973), the one person, one vote requirement does not now apply to judicial elections. Wells did not hold, however, that all Fourteenth Amendment challenges to judicial selection schemes are barred. This Court has specifically recognized political gerrymandering claims that do not necessarily involve a one person, one vote remedy. For example, the districts Bandemer challenged met the one person, one vote standard. "The issue here . . . does not concern districts of unequal size." Bandemer, 478 U.S. at 124. It is not, therefore, surprising that one Circuit Court has articulated the need for alternative relief where a Fourteenth Amendment violation is found and a remedy based upon one person, one vote is not available.

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[16] In addition, the Court signaled that the well-established recognition that judges engage in policymaking indicates that judges should be treated like other elected policymakers. ___ U.S. ___ at ___, 111 S. Ct. at 2366 n.27.

In Voter Information Project, Inc. v. City of Baton Rouge, 612 F.2d 208 (5th Cir. 1980), plaintiffs alleged that the at-large voting schemes of electing city judges invidiously diluted the voting strength of African-American citizens in violation of the Fourteenth and Fifteenth Amendments.[17] As in the present case, the district court dismissed the action for failure to state a claim upon which relief could be granted, basing its decision upon the principle that the one person, one vote remedy does not apply to the election of judges, and citing Wells. On appeal, the United States Court of Appeals for the Fifth Circuit held that the District Court had erred in dismissing the complaint:

> The problem with the District Court's opinion, however, is that it assumes the 'one man one vote' principle was the exclusive theory of the plaintiffs' complaints . . . .
>
> To hold that a system designed to dilute the voting strength of black citizens and prevent the election of blacks as Judges is immune from attack would be to ignore both the language and purpose of the Fourteenth and Fifteenth Amendments . . . . If plaintiffs can prove that the purpose and operative effect of such purpose of the at-large election schemes in Baton Rouge is to dilute the voting strength of black citizens, then they are entitled to some form of relief.

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[17] No Voting Rights Act claim was asserted in Voter Information Project; thus, the holding in that case is clearly based on the same constitutional principles at issue here.

612 F.2d at 211-12 (emphasis added). The Fifth Circuit properly took no position regarding what relief would be appropriate. 612 F.2d at 212 n.5.

The reasoning of Voter Information Project is persuasive. There, even though the one person, one vote principle did not apply, the Circuit Court permitted the plaintiffs to go forward to offer their proof that an at-large system of electing judges diluted their votes in contravention of the Fourteenth Amendment. Neither the judicial function of the elected judges nor the unavailability of the one person, one vote remedy justified dismissal or precluded the plaintiffs from presenting their case, as properly recognized by the Fourth Circuit in this case. Martin, 980 F.2d at 954; Pet. App. 23a-24a. Similarly, the present plaintiffs should be permitted to go forward. If they prevail, a remedy can then be considered. Logically, the question of remedy -- of any type -- cannot and should not determine justiciability. To permit post-trial considerations to govern threshold issues is simply premature.[18] See Martin, 980 F.2d at 953; Pet. App. 19a-20a.

Although Hadley was itself a one person, one vote case, the opinion indicated, in dicta, that the duties of some government officials may not always require a remedy involving one person, one vote principles under Reynolds v. Sims, 377 U.S. 533 (1964). Neither that dicta nor Hadley's reasoning in any way limits the holding which, still today, requires an "equal opportunity to participate" in the electoral process. In other words, while one person, one vote might not be the remedy for every Fourteenth

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[18] See also Connor v. Finch, 431 U.S. 407 (1977) (after a finding that an election scheme is unlawful, the legislature is entitled to an opportunity to create a lawful remedy).

Amendment violation, every such violation would nevertheless require some remedy.

D. Principles of Federalism do not Prevent Judicial Examination of the Plaintiffs' Claims.

The NCSBE insists that "[a]n order granting . . . relief would be an unprecedented assumption of a power to restructure a state's fundamental organization of its judiciary and would violate constitutional principles of federalism." Pet. 24. Implicit in this argument are two assumptions, both of which are incorrect.

First, this contention incorrectly assumes that a finding of a constitutional violation would necessarily be followed by a remedy imposed by a federal district court. In fact, the state legislature would have the initial opportunity to cure the violation. Connor v. Finch, 431 U.S. 407 (1977). Furthermore, the remedy sought is identical to the existing North Carolina constitutional provision which authorizes election by the voters of the respective districts. N.C. Const., art. IV, § 16. Finally, the changes embraced by the state in Chapter 509 to remedy the racial discrimination in Alexander v. Martin -- redrawing the boundaries of 26 judicial districts -- were far more intrusive than the remedy sought here -- election in the same districts as currently exist.

Second, the NCSBE's argument misapprehends the concept of federalism. The principles of federalism discussed in Gregory v. Ashcroft, ___ U.S. ___, 111 S. Ct. 2395 (1991) -- upon which the NCSBE relies -- involve the allocation of powers between the federal and state governments and limitations upon congressional authority to interfere with state sovereignty. The NCSBE is misguided in attempting to equate limits upon congressional

power to alter the form or the method of functioning of a state's government with limits upon the power of a federal court to entertain an Equal Protection claim. See Pet. 26. There is no principle of federalism that provides a prophylactic cloak to bar federal judicial scrutiny of a state's discriminatory manipulation of the election of its judiciary.

In fact, Rizzo v. Goode, 423 U.S. 362 (1976), cited by the Petitioners in support of the proposition that federalism "conditions and limits the power of federal courts to interfere with state governmental structures," Pet. 26, actually states that federal courts may in fact intervene, when a federal constitutional violation is present, "under the well-established rule that federal 'judicial powers may be exercised . . . on the basis of a constitutional violation.'" 423 U.S. at 377 citing Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1 (19[illegible] Similarly, the NCSBE's reliance upon Growe v. Emi[illegible] ___ U.S. ___, 113 S. Ct. 1075 (1993), is unavailing. T[illegible] case resolved a controversy that arose when ident[illegible] claims relating to a state's reapportionment process w[illegible] simultaneously asserted in state and federal courts. T[illegible] Court held that the federal district court erred in failing [illegible] defer to a state court's timely efforts to redraw legislat[illegible] and congressional districts. No similar issues are presented by the Petition in the present case. Finally, as explained above, any concerns about the possibility of federal intrusions should be allayed by the fact that, if the District Court here finds that North Carolina's statewide election scheme is unconstitutional, it will properly defer to the legislature to structure a remedy before imposing one. Connor v. Finch, 431 U.S. 407 (1977).

II. THE PLAINTIFFS HAVE PROPERLY STATED CLAIMS UPON WHICH RELIEF MAY BE GRANTED.

Consistent with Bandemer, the plaintiffs have properly stated a claim for relief under the Fourteenth Amendment. The plaintiffs allege "intentional discrimination against an identifiable political group." Bandemer, 478 U.S. at 127. Republicans in North Carolina are as much an identifiable group as Democrats were in Indiana.[19]

In addition to establishing the existence of an identifiable group, the plaintiffs have offered ample historical evidence of disproportionate electoral results coupled with a consistent pattern of invidious legislative decisions designed to disadvantage Republicans and other minority groups.[20]

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[19] The Petition challenges whether "Republican voters," as defined in ¶ 2 of the Complaint, can be identified "so that its numbers, hence its potential voting strength, can be determined; and the appropriate geographical areas within which its potential voting strength can be measured." Pet. 18, quoting Judge Phillips' dissenting opinion at Pet. App. 97a. Aside from the fact that such an assertion ignores the development of sophisticated political demography over the last 40 years, on a motion to dismiss, the allegations of the Complaint must be taken as true. Jenkins v. McKeithen, 395 U.S. 411 (1969). The Complaint clearly alleges that such identification can be and has been done. See ¶ 30, App. 15a.

[20] This Court discussed the types of proof available to plaintiffs to prove official discrimination under similar circumstances in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), a case involving allegations of racially discriminatory zoning decisions:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive

For over two hundred years, the state has used both direct and indirect methods to abridge the political rights of racial[21] and political[22] groups. This Court has participated in several attempts to remedy election practices and procedures maintained by the State of North Carolina to

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> inquiry into such circumstantial and direct evidence of intent as may be available . . . Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).

429 U.S. at 266. See also 429 U.S. at 267 n.13. In addition, Arlington Heights provided a nonexclusive list of other types of proof that plaintiffs may properly use: historical evidence, legislative or administrative history, contemporary statements by members of the decision-making body and minutes of its meetings or reports.

[21] For a discussion of the history of official voting mechanisms designed to minimize or cancel the potential voting strength of minority citizens in North Carolina, see Gingles v. Edmisten, 590 F.Supp. 345, aff'd in part, rev'd in part sub nom Thornburg v. Gingles, 478 U.S. 30 (1986).

[22] Some examples of official voting mechanisms designed to minimize or cancel the potential voting strength of minority political groups in North Carolina include:

- party loyalty oaths (see Clark v. Meyland, 261 N.C. 140, 134 S.E.2d 168 (1964));
- ballot counting rules that unlawfully prevented cross-over voting, found to disadvantage Republican candidates and voters (see Hendon v. North Carolina State Bd. of Elections, 710 F.2d 177 (4th Cir. 1983)); and
- ballot position rules that favor Democrat candidates (see N.C. Gen. Stat. § 163-140.1).

deny full exercise of the fundamental right to vote. See Drum v. Seawell, 249 F. Supp. 877 (M.D.N.C. 1965), aff'd, 383 U.S. 831 (1966) (apportionment of the state for the election of members of the legislature and representatives to Congress was unconstitutionally discriminatory and therefore void); Gaston County, North Carolina v. United States, 395 U.S. 285 (1969) (use of a literacy test as a prerequisite to registering to vote has the effect of denying or abridging the right to vote on account of race or color); Thornburg v. Gingles, 478 U.S. 30 (1986) (multi-member districts found to dilute the votes of minority voters); Shaw v. Reno, No. 92-357, 1993 WL 224459 (U.S. June 28, 1993) (congressional reapportionment scheme is so irrational on its face that it can be understood only as an effort to segregate voters on the basis of race).

Over time, successful Fourteenth Amendment challenges have altered the nature of some of the discriminatory election schemes imposed by the State of North Carolina, but they have not been eliminated entirely. As a result, recent legislatures changed past methods of overt discrimination to a less blatant approach. For example, the notorious "grandfather clause" of 1900 -- conspicuously designed to disenfranchise African-American voters -- gave way to more discrete poll taxes and literacy requirements. See generally Lefler and Newsome, North Carolina, The History of a Southern State (1973). Later still, "numbered seat" and "anti-single shot" laws, while facially neutral, operated to discriminate against minorities. See Dunston v. Scott, 336 F. Supp. 206 (E.D.N.C. 1972).

As a part of this historical backdrop, North Carolina Republicans have been effectively excluded from the superior court judicial selection process. More than four decades ago, in the most comprehensive and authoritative study of politics in the American South, Professor V.O.

Key recognized and documented every element of proof required of the plaintiffs in this action:

> The west[ern part of North Carolina], however, elects virtually all the Republican legislators and local officials. There Democrats must gerrymander to keep Republican victories to a minimum.
>
> * * *
>
> Western Democrats are grateful also for such fortuities of North Carolina politics as the election of circuit [superior court] judges by the state at large. Democratic nominees, selected in primaries held by districts, some of which unavoidably contain large numbers of Republicans, are elected by the party's majority in the state as a whole.

V.O. Key, Southern Politics in State and Nation, 220, 226 (1949).[23]

The NCSBE asserts that, in order to succeed in a political gerrymandering claim, plaintiffs must allege that they have been completely shut out of the political process as a whole. There is no dispute that, under Bandemer, a political gerrymandering claim must allege: (1) intentional discrimination against an identifiable political group, 478 U.S. at 127, (2) an actual discriminatory effect on that group, Id., and (3) that the challenged election system is

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[23] The RPNC acknowledges the anomalous election of one Republican candidate to the office of superior court judge in November, 1988. One electoral victory in eighty-eight years does not offer any evidence of a fair selection process. As this Court noted, it is proper to consider the effect of the pendency of this litigation in assessing the significance of this single electoral success. See Thornburg v. Gingles, 478 U.S. 30, 75-76.

arranged in a manner that will consistently degrade the plaintiffs' influence on the political process as a whole. 478 U.S. at 132. The NCSBE challenges the panel's opinion only with regard to the final prong of Bandemer, contending that, in order to meet the third requirement, "plaintiffs must be able to allege exclusion from the state's political life as a whole, and not simply lack of success in the particular electoral system they are challenging." Pet. 29.

The Court of Appeals correctly concluded that the RPNC "set forth allegations of an actual discriminatory effect sufficient to state a claim of vote dilution brought about by political gerrymandering." Martin, 980 F.2d at 958; Pet. App. 33a. In a straightforward fashion, the Circuit Court opinion considered whether Bandemer requires plaintiffs to plead total exclusion from the political process and "declin[ed] to adopt a construction of Bandemer that would render nugatory [this Court's] holding that political groups may bring claims of partisan gerrymandering." Id.; Pet. App. 32a.

Although certain district courts have construed the "political process as a whole" language narrowly to restrict political gerrymandering claims,[24] the better guide to its meaning is the real-life political arena in the State of Indiana, from which Bandemer arose. In Bandemer, Indiana Democrats had clearly enjoyed electoral success in state legislative elections.[25] That success, however, was

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[24] See Pet. 30-31.

[25] In fact, under the plan challenged in Bandemer, Democratic candidates for the Indiana State House of Representatives received 51.9% of the votes cast statewide and won 43 of 100 seats. In the Senate, 53.1% of the votes were cast for Democratic candidates; of the 25 Senate seats to be filled, Republicans won 12 and Democrats 13.

not sufficient to bar the Democrats' challenge to legislative districting, because the Democrats' voting strength was significantly diminished by the intentional discrimination practiced by the defendant Republicans.[26] Because an even more severe diminution has been pled by the RPNC, a rejection of this complaint, based on the NCSBE's construction of Bandemer, would effectively reject its holding.

III. THERE IS NO CONFLICT IN THE CIRCUITS ON ANY QUESTION SUFFICIENT TO WARRANT THIS COURT'S GRANT OF CERTIORARI.

Notwithstanding the indisputably unique facts of this case, the NCSBE asserts the existence of a serious conflict between the Fourth Circuit in the present case and the holdings of lower courts that have considered claims of political gerrymandering since Bandemer. No such conflict warranting examination by this Court exists. In each previous case cited by the Petitioners, there was either a failure to plead or to prove a consistent degradation of the influence of a cognizable group on the political process as a whole. As shown below, in every case cited, plaintiffs raised gerrymandering claims against plans under which significant numbers of the minority party had been elected to the very office under challenge. In contrast, Republican votes in the present case have effectively been cancelled entirely by the challenged election mechanism.

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478 U.S. at 134.

[26] This Court ultimately dismissed the Democrats' claims in Bandemer because their proof included only a single election, thereby failing to establish discriminatory effect over time. 478 U.S. at 135. In contrast, here plaintiffs have pled a century of being shut out of judicial elections.

In Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988), aff'd mem., 488 U.S. 1024 (1989), California Republicans alleged political gerrymandering in the redistricting of that state's congressional seats, 40 percent of which were held by Republicans. The Badham court dismissed the complaint specifically because of its failure to make factual allegations regarding California Republicans' role in the political process as a whole. 694 F. Supp. at 670.

In Holloway v. Hechler, 817 F. Supp. 617 (S.D. W. Va. 1992), aff'd mem., ____ U.S. ____, 113 S. Ct. 1378 (1993), a challenge by Republicans to West Virginia's legislative apportionment on political gerrymandering (and other) grounds, the court found that the plaintiffs' evidence at trial failed to prove "intentional discrimination against an identifiable political group" and that any gerrymandering that may have occurred was merely de minimis. 817 F. Supp. at 628. At the time of the ruling, 26 of 100 delegates to the West Virginia House of Delegates were Republicans.

Pope v. Blue, 809 F. Supp. 392 (W.D.N.C.), aff'd mem., ___ U.S. ___, 113 S. Ct. 30 (1992), presented a political gerrymandering challenge to North Carolina congressional districts. The district court held that the Republicans' complaint failed to meet Bandemer's requirement for alleging discriminatory effect. "The plaintiffs do not allege, nor can they, that the state's redistricting plan has caused them to be 'shut out of the political process.'" 809 F. Supp. at 397. At the time Pope was filed, four of North Carolina's 11 members of Congress were Republicans.

No pleading defect was identified in Fund for Accurate and Informed Representation v. Weprin, 796 F. Supp. 662 (N.D.N.Y.), aff'd mem., ____ U.S. ___, 113

S. Ct. 650 (1992). There, the court denied a pretrial motion to dismiss a political gerrymandering claim. Fund for Accurate and Informed Representation v. Weprin, No. 92-CV-283, slip op. (N.D.N.Y., May 28, 1992) (three-judge court). The panel stated that the complaint:

> sets forth in more than adequate detail allegations of intentional discrimination and significant harms this plan allegedly will cause. . . . we think the increased particularity in pleading required under Bandemer has been satisfied and we cannot conclude beyond doubt that plaintiffs can prove no set of facts upon which relief might be warranted under the Constitution.

Id. at 9-10.

Subsequently, however, the plaintiffs' proof of their case on the merits failed to establish liability. "Plaintiffs' evidence, even when considered in its most persuasive light, falls short of proving that the Assembly apportionment plan deprives Republicans of an opportunity to 'influence [New York State's] political process as a whole.'" 769 F. Supp. at 669 (emphasis added). Republicans held a majority of the New York state senate seats at that time.

In sharp contrast to the decisions in Badham, Pope and Holloway, the RPNC's complaint does "contain allegations of an effect that goes beyond mere disproportionate election results," Martin, 980 F.2d at 957; Pet. App. 30a, and which "are sufficient in number, detail, and variety of particulars to avoid the problem of repetitive or conclusory statements." Martin, 980 F.2d at 957 n.26;

Pet. App. 30a n.26.[27] In considering a motion to dismiss, it is axiomatic that these allegations of the complaint should be considered to be true and should be construed in the light most favorable to the plaintiffs. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[27] The plaintiffs have made numerous detailed allegations of intentional discrimination and exclusion from the political process as a whole in meeting the Bandemer pleading requirements. See Complaint ¶¶ 27-48, App. 14a-24a.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
GREENSBORO DIVISION

REPUBLICAN PARTY OF NORTH CAROLINA, BRUCE BRIGGS, WILLIAM R. SIGMON, MARVIN K. GRAY, R. HOWARD RIDDLE, LLOYD FOWLER JOE R. WILSON, R. WALTER WHITE, EDGAR A. READLING, JR., FREDERIC M. GALLAGHER, and RALPH A. WALKER,	)	Civil Action No. C-87-779-G
Plaintiffs,	)	**COMPLAINT**
vs.	)	
JAMES G. MARTIN, Governor of North Carolina; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; ROBERT N. HUNTER, JR., Chairman of the North Carolina State Board of Elections, THOMAS A. FARR, WILLIAM A. MARSH,	)	**[FILED - NOVEMBER 4, 1987]**

JR., RUTH TURNER)
SEMASHKO, and)
JUNE K. YOUNGBLOOD,)
members of the)
North Carolina)
State Board of)
Elections, DURHAM)
COUNTY BOARD OF)
ELECTIONS, FORSYTH)
COUNTY BOARD)
OF ELECTIONS, and)
GUILFORD COUNTY)
BOARD OF ELECTIONS,)
)
Defendants.)
)

Plaintiffs, complaining of the Defendants, allege and say:

INTRODUCTION AND SUMMARY

This case is brought under the First and Fourteenth Amendments to the United States Constitution. It challenges the voting custom, practice or procedure of district nomination followed by statewide election of state resident Superior Court judges in that (1) statewide election was and is maintained for the purpose and has the effect of restricting the free exercise of the fundamental rights of freedom of speech and association because it penalizes Republican Voters (as defined herein) solely because of their party affiliation, political beliefs and associations and chills public debate on issues of public importance and (2) it consistently degrades the influence of Republican Voters on the political process as a whole.

This cas also challenges the voting custom, practice or procedure of "numbered posts" for resident Superior Court judgeships as a result of which candidates may run only for a judgeship for a particular judicial district, rather than running at-large for all resident Superior Court judgeships which are up for election in a given year. Such voting custom, practice or procedure has no state statutory authority and was implemented and was and is maintained for the purpose and has the effect of consistently degrading the influence of Republican Voters on the political process as a whole.

This case also challenges the district nomination process which is an integral part of the "numbered post" system. There is no state statutory authority for district, rather than statewide, nomination of Superior Court judges. The district nomination process in combination with statewide election was implemented and was and is maintained for the purpose and has the effect of consistently degrading the influence of Republican Voters on the political process as a whole.

Finally, this case also challenges the recently enacted requirement that candidates for resident Superior Court judge must reside in the district for which they seek election. Such voting custom, practice or procedure is contrary to the Constitution of North Carolina and was implemented and was and is maintained for the purpose and has the effect of consistently degrading the influence of Republican Voters on the political process as a whole.

The four voting customs, practices and procedures challenged in this case, in conjunction with other facts alleged herein, result in the overwhelming predictability of the success of Democratic candidates for resident Superior

Court judge and constitute the structural dilution of the voting franchise of Republican Voters.

The relief sought is a declaration establishing and protecting plaintiffs' constitutional rights, a preliminary and permanent injunction prohibiting the defendants from conducting elections for resident Superior Court judge under the existing system, and an order that such elections shall be conducted by judicial district for both nomination and general election (without a candidacy residency requirement) in such a fashion that does not unlawfully discriminate against Republican candidates and Voters. Plaintiffs also pray that the Court award to the plaintiffs the costs of this action, including reasonable attorneys' fees.

JURISDICTION

1. Jurisdiction is conferred upon the Court by 28 U.S.C. §§1343(3) and (4) and plaintiffs have a right to bring this suit pursuant to 42 U.S.C. §§1981, 1983 and 1988. Plaintiffs also seek declaratory relief pursuant to 28 U.S.C. §§2201 and 2202.

PARTIES

2. Plaintiff Republican Party of North Carolina (the "NCGOP") is a statutorily recognized political party with elections and other activities throughout the State of North Carolina. The NCGOP represents and promotes the interests of both voters who are registered as Republicans and voters who, although not registered as Republicans, predictably vote for Republican candidates (taken together, hereinafter referred to as "Republican Voters").

3. Plaintiff Bruce Briggs is a registered Republican Voter in the 24th Judicial District. In 1984, he was

the Republican candidate for resident Superior Court judge for the 24th Judicial District. In that election, he received a statewide total of 868,201 votes and his Democratic opponent received a total of 1,017,819 votes. In the 24th Judicial District, however, Plaintiff Briggs received 20,170 votes and his Democratic opponent received only 17,464 votes. But for the requirement of statewide election of resident Superior Court judges imposed by the defendants or their predecessors in office, Plaintiff Briggs would have been elected.

4. Plaintiff William R. Sigmon is a registered Republican Voter in what was the 25th Judicial District. [The Superior Court judicial districts were extensively modified by Chapter 509 of the Session Laws of 1987. N.C.G.S. §7-A-41. See the allegations of paragraphs 12, 20 and 21, infra.] In 1968, he was the Republican candidate for resident Superior Court judge for what was then the 25th Judicial District. In that election, he received a statewide total of 589,361 votes and his Democratic opponent received a total of 798,484 votes. In what was then the 25th Judicial District, however, Plaintiff Sigmon received 39,751 votes and his Democratic opponent received only 32,536 votes. But for the requirement of statewide election of resident Superior Court judges imposed by the defendants or their predecessors in office, Plaintiff Sigmon would have been elected.

5. Plaintiff Marvin K. Gray is a registered Republican Voter in what was the 26th Judicial District. In 1986, he was appointed a resident Superior Court judge for that district to fill and unexpired term. In 1986, he was the Republican candidate for one of two resident Superior Court judgeships for what was then the 26th Judicial District. In that election, he received a statewide total of 627,539 votes and his two Democratic opponents, Robert

Burroughs and W. Terry Sherrill, received a total of 785,816 votes and 793,428 votes, respectively. In what was then the 26th Judicial District, however, Plaintiff Gray received 49,135 votes, Burroughs received only 42,825 votes and Sherrill received only 44,753 votes. But for the requirement of statewide election of resident Superior Court judges imposed by defendants, Plaintiff Gray would have been elected.

6. Republicans who are potential candidates for resident Superior Court judge are aware of the election statistics recited in paragraphs 3 through 5 hereof. As a result thereof, they are chilled or prevented from offering themselves as candidates for resident Superior Court judge and the electorate is thereby deprived of choice in the selection of resident Superior Court judges.

7. Plaintiff R. Howard Riddle is a registered Republican Voter in Madison county in the 24th Judicial District. In 1984, he voted for Bruce Briggs for resident Superior Court judge for the 24th Judicial District. For many years, he has been affiliated with the Republican Party, has voted for the Republican candidates for resident Superior Court judge and other offices and intends to do so in the future. Because of the custom or practice of statewide election of resident Superior Court judges imposed and maintained by the defendants and their predecessors in office, he has been and is deprived of his ability to participate equally in the political process and to elect judges of his choice and his influence on the political process as a whole has been and is consistent degraded.

8. Plaintiffs Lloyd Fowler and Joe R. Wilson are registered Democratic Voters in Madison County in the 24th Judicial District. In 1984, they voted for Bruce Briggs for resident Superior Court judge for the 24th

Judicial District. For many years, they have been affiliated with the Democratic Party, by they have voted for the Republican candidates for resident Superior Court judge and other offices and intended to do so in the future. Because of the custom or practice of statewide election of resident Superior Court judges imposed and maintained by the defendants and their predecessors in office, they have been and are deprived of their ability to participate equally in the political process and to elect judges of their choice and their influence on the political process as a whole is consistently degraded.

9. Plaintiff R. Walter White is a registered Republican Voter in Davie County in the 22nd Judicial District. In 1968, he voted for Arthur S. Beckham, Jr., for resident Superior Court judge for the 22nd Judicial District (see the allegations of paragraph 35, infra). For many years, he has been affiliated with the Republican Party, has voted for Republican candidates for resident Superior Court judge and other offices and intends to do so in the future. Because of the custom or practice of statewide election of resident Superior Court judges imposed and maintained by the defendants and their predecessors in office, he has been and is deprived of his ability to participate equally in the political process and to elect judges of his choice and his influence on the political process as a whole has been and is consistently degraded.

10. Plaintiff Edgar A. Readling, Jr., is a registered Republican Voter in Catawba County in what was the 25th Judicial District. In 1968, he voted for William R. Sigmon for resident Superior Court judge for what was then the 25th Judicial District. For many years, he has been affiliated with the Republican Party, has voted for the Republican candidates for resident Superior Court judge and other offices and intends to do so in the future.

Because of the custom or practice of statewide election of resident Superior Court judges imposed and maintained by the defendants and their predecessors in office he has been and is deprived of his ability to participate equally in the political process and to elect judges of his choice and his influence on the political process as a whole has been and is consistently degraded.

11. Plaintiff Frederic M. Gallgaher is a registered Republican Voter in Mecklenburg County in what was the 26th Judicial District. In 1986, he voted for Marvin Gray for resident Superior Court judge for what was then the 26th Judicial District. For many years, he has been affiliated with the Republican Party, has voted for the Republican candidates for resident Superior Court judge and other offices and intends to do so in the future. Because of the custom or practice of statewide election of resident Superior Court judges imposed and maintained by the defendants, he has been and is deprived of his ability to participate equally in the political process and to elect judges of his choice and his influence on the political process as a whole has been and is consistently degraded.

12. Plaintiff Ralph A. Walker is a registered Republican Voter in Guilford County in what was the 18th Judicial District. He is currently serving as a resident Superior Court Judge in what is now called the 18th-B Judicial District, having been appointed by the Governor to replace Edward K. Washington who retired. Plaintiff Walker resides in what is now called the 18th-E Judicial District. Pursuant to Section 13 of Chapter 509 of the Session Laws of 1987 [G.S. §163-106(i)], Plaintiff Walker is prohibited from running for election for the judgeship which he now holds because he is not a resident of the so-called 18th-B Judicial District. This residency requirement was implemented for the purpose and has the effect of

BEST AVAILA

preventing Republicans from being successful candidates for Superior Court judge. Attached to this complaint as Exhibit B [omitted] and incorporated herein by reference is a letter from Leslie J. Winner, Esquire, in connection with this allegation and which states that "the restriction of candidate residence was articulated . . . to prevent wealthy white Republican lawyers from being able to [run-in] . . . the black election districts." Thus, the residency requirement was solely and directly intended to discriminate against Republican candidates and Voters.

13. The Defendant James G. Martin is the Governor in and for the State of North Carolina and, in such capacity, is the Chief Executive Officer of the State charged with the duty of enforcing compliance with state legislation under Article II, Section 5(4) of the Constitution of North Carolina.

14. The Defendants Robert N. Hunter, Jr., Thomas A. Farr, William A. Marsh, Jr., Ruth Turner Semashko, and June K. Youngblood are the members of the North Carolina Board of Elections, the Defendant Robert N. Hunter, Jr., being the Chairman of said Board, all of said defendants being charged with exercising the powers and duties of the State Board of Elections pursuant to N.C.G.S. §163-22

15. The Defendants Durham County Board of Elections, Forsyth County Board of Elections and Guilford County Board of Elections are local boards of elections established pursuant to N.C.G.S. §163-30. These defendants have the duty and authority, pursuant to N.C.G.S. §163-33 and N.C.G.S. §163-109, to prepare, print distribute and count the ballots for the primary election for Superior Court Judge. These defendants are integral parts of the voting customs, practices and procedures complained

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of herein and on information and belief, these defendants will perform their duties and exercise their powers in the manner complained of herein. In particular, the defendants will conduct primaries which constitute a district, rather than a statewide nomination process and will require candidates to run for "numbered posts." In addition, the Defendant Guilford county Board of Elections will refuse to allow Plaintiff Walker to run as a candidate in the primary for Superior Court Judge for the so-called 18th-B Judicial District.

16. By performing their respective duties with regard to the challenged statutes, electoral system, voting customs, practices and procedures or processes and nomination districts, defendants and each of them, in their respective official capacities, act under color of state statutes, ordinances, regulations, customs and uses of the State of North Carolina which have the purpose of and have resulted and will result in a deprivation of the rights guaranteed to the plaintiffs, as Republican Voters and candidates, by the Constitution and laws of the United States.

VENUE

17. Venue in the United States District Court for the Middle District of North Carolina is proper under 28 U.S.C. §1392.

NOTICE

18. Pursuant to N.C.G.S. §1-260, notice of this action has been given to the Attorney General of the State of North Carolina by sending him a copy of this Complaint via certified mail.

FACTS

19. The counties of the State of North Carolina are organized into four (4) judicial divisions which, until 1987, were divided into a total of 34 judicial districts. Each division and judicial district had the counties and the number of residents Superior Court judges set forth in the table attached hereto as Exhibit A-1 [omitted]. Most of the judicial districts encompassed more than one county and all district followed county boundary lines. Seventeen of the judicial districts had more than one judge and these districts had 43 of the 60 resident Superior Court judges.

20. Pursuant to Section 1 of Chapter 509 of the Session Laws of 1987 (hereinafter referred to as "Chapter 509") (N.C.G.S. §7A-41), many of these Judicial Districts were split and there are now 70 so-called Judicial Districts. In the case of seven old Judicial Districts, they were split into sub-districts which are called judicial districts but which, in reality, have no legitimate judicial function or purpose. The divisions and judicial districts, geographical areas included therein and the number of Superior Court judges in each are set forth in the table attached hereto as Exhibit A-2 [omitted]. The new so-called Judicial Districts frequently split counties or consist of partes of more than one county. Sixteen of the new so-called Judicial Districts do not contain a courthouse and have no separate Clerk of Court or other official of a true judicial district, except for the resident Superior Court judge assigned thereto. Chapter 509 established and maintains Judicial Districts solely for the purpose of perpetuating in office the existing Superior Court judges who are all Democrats (with the exception of three who have been appointed by the Governor), ensuring that black Democrats are elected Superior Court judges in some sub-districts and perpetuating the degradation of the influence of Republican Voters on the

political process as a whole and the structural dilution of the voting franchise of Republican Voters.

21. In its consideration of Chapter 509, the General Assembly had presented to it amendments offered by Republican legislators and supported by the Republican Governor which would have eliminated the statewide election of resident Superior Court judges and, instead, would have provided for district election in accordance with the relief prayed for herein. Such amendments were defeated by the overwhelming Democratic majority, on party line votes. Chapter 509 continues statewide election and the other voting customs, practices and procedures complained of herein for the purpose and with the effect of consistently degrading the influence of Republican Voters on the political process as a whole.

22. The total number of resident Superior Court judges, the composition of the divisions and judicial districts and the assignment of judges to districts was not established by the North Carolina Constitution or General Assembly at any one particular time, but has resulted from various acts passed from time to time increasing the number of judges in a given district or establishing new districts or divisions.

23. The method of selection of resident Superior Court judges has not been consistent in the historical past, the same having varied from (a) appointment by the Governor for life or for a term, (b) election by the General Assembly and (c) election by the people. Since 1968, the Constitution of North Carolina has provided that resident Superior Court judges "may be elected by the qualified voters of the State or by the voters of their respective districts, as the General Assembly may prescribe." N.C. Const. Art. IV, Sec. 16.

24. The geographical areas served by resident Superior Court judges have not been constant in the historical past, the same having varied from (a) rotation throughout the entire state, (b) rotation within a division and (c) service in and for only one judicial district. Since 1915, resident Superior Court judges have rotated within a judicial division. Although resident Superior Court judges may, upon proper commissioning, exercise their authority throughout the state, only rarely are they assigned outside their division. Resident Superior Court judges exercise numerous unique statutory powers in the judicial district for which they are elected.

25. By custom or practice imposed and maintained by defendants and their predecessors in office, resident Superior Court judges are nominated by judicial district, although there is no statutory requirements to this effect. In fact, a fair and impartial reading of the North Carolina election laws would lead to the conclusion that resident Superior Court judges should be nominated statewide. In particular, N.C.G.S. §163-1(a) provides that:

> elections for the officers listed in the tabulation contained in this section shall be conducted in all election precincts of the territorial units specified under the column headed "Jurisdiction" . . . ."

The relevant section of the tabulation is as follows:

"Office	Jurisdiction
* * * *	
Judges of Superior Court	State"

N.C.G.S. §163-1(b) makes subsection (a) and the above-quoted table applicable to primaries.

26. Resident Superior Court judges are then selected from these nominees by statewide vote pursuant to N.C.G.S. §163-1(a). Nowhere in this section is thee any requirement that candidates for resident Superior Court judge run for a specific judgeship for a particular judicial district. Rather, a fair and impartial reading of this section would require all candidates for resident Superior Court judgeships to run at-large for all available seats, with the top votegetters being successful as to the number of judgeships being elected in a particular year. The only requirement is that, once elected, resident Superior Court judges must reside in the judicial district for which they are elected. N.C. Const. Art. IV §9(1).

27. The voting custom, practice or procedure of district, rather than statewide, nomination of resident Superior Court judges, together with the voting custom, practice or procedure of requiring candidates for resident Superior Court judge to run for a specific judgeship for a particular judicial district, constitutes a "numbered post" system, established and maintained for the purpose and having the effect of consistently degrading the influence of Republican Voters on the political process as a whole.

28. Plaintiffs named or described in Paragraphs 3 through 7, and 9 through 12 are registered Republicans, are affiliated with the North Carolina Republican Party and are associated with others similarly situated across the State of North Carolina to advance and advocate commonly held policies and beliefs by, among other things, supporting and voting to elect Republican Candidates for resident Superior Court judge and thereby to transform mutually held beliefs into public policies. Each such plaintiff predictably votes

for Republican Candidates for public office, including resident Superior Court judge.

29. Plaintiffs named in Paragraph 8 are registered Democrats but, because they share and desire to advance and advocate policies and beliefs held by Republicans, they support and vote in general elections to elect Republican candidates for resident Superior Court judge and thereby to transform such mutually held beliefs into public policies. Such plaintiffs predictably vote in general elections for Republican candidates for public office, including resident Superior Court judge.

30. In North Carolina, there are identifiable groups of voters whose voting behavior is consistent and can be ascertained from past elections and predicted in future elections with reasonable accuracy. Republican voting strength in specific geographical areas, particularly judicial districts, can be so ascertained and predicted. The core of Republican strength is registered Republicans, such as the plaintiffs named in Paragraphs 3 through 7 and 9 through 11, to which are added others who, although not registered Republicans, predictably and do in fact vote for Republican candidates, such as the plaintiffs named in Paragraph 8. The geographical distribution in North Carolina of this group of Republican Voters is sufficiently ascertainable by judicial district that it could have been, was, can be and is taken into account in the intent and purpose by which defendants and their predecessors in office have instituted, maintained and maintain the voting customs, practices and procedures complained of in this action. The same facts are true of Democratic voting strength.

31. Plaintiffs are an identifiable, quantifiable and politically salient group of voters whose voting behavior

can be ascertained and predicted with reasonable accuracy. Plaintiffs are Republican Voters who in fact vote for Republican candidates and will predictably do so in the future. Plaintiffs and other Republican Voters have suffered harm and irreparable injury because the voting customs, practices and procedures complained of herein operate, and were and are intended to operate, to minimize or cancel their votes and voting strength. Plaintiffs' votes and the votes of other Republican Voters are persistently degraded and cancelled in the election of resident Superior Court judges because of such voting customs, practices and procedures. Republican Voters do not have the same opportunity as do Democrats (or, as a practical matter, any opportunity) to elect candidates of their choice for resident Superior Court judge. In fact, their opportunity to do so is eliminated by the voting customs, practices and procedures complained of herein, which were designed for and were and are maintained for such purpose by defendants and their predecessors in office.

32. The proportion of all voters who are Republican Voters varies widely throughout the State of North Carolina. For example, at the time of the 1984 general election, 26% of all voters were registered Republicans, 70% were registered Democrats, and 4% were registered to vote but unaffiliated with either party. In the 1984 general election, approximately 46% of all voters who voted for Superior Court judges voted for the Republican candidates, and approximately 54% voted for the Democratic candidates. In the 24th Judicial District, however, 54% of the voters who voted for Superior Court judge voted for the Republican candidate for Superior Court judge for that district and 46% voted for the Democratic candidate. Similarly, in what were then the 15A, 17B, 18, 19A, 19B, 21, 22, 23, 24, 25, 26, 27A, 28 and 29 Judicial Districts, a majority of voters who voted for Superior

Court judge voted for the Republican candidates. No Republican resident Superior Court judges were elected because of the structural dilution of Republican votes by the voting customs, practices and procedures complained of herein.

33. At the time of the 1986 general election, 27% of all voters were registered Republicans, 69% were registered Democrats and 4% were registered to vote unaffiliated with either party. In the 1986 general election, approximately 43% of all voters who voted for resident Superior Court judges voted for the Republican candidates and approximately 57% voted for the Democratic candidates. In what was then the 26th Judicial District, however, 52% of the voters who voted for resident Superior Court judge voted for the Republican candidate for Superior Court judge for that district and approximately 48% voted for the Democratic candidates. Similarly, in what were then the 19A, 19B, 22, 23, 24, 25, 26, 27A and 29 Judicial Districts, a majority of voters who voted for resident Superior Court judge voted for the Republican candidates. No Republican resident Superior Court judges were elected because of the structural dilution of Republican votes by the voting customs, practices and procedures complained of herein.

34. Since 1968, 10 Republicans have run for resident Superior Court judge. In 4, or 40%, of these contests, the Republican candidate would have been successful if resident Superior Court judges were elected by the qualified voters of the judicial district in question, rather than by statewide election. Since 1900, no Republican has been elected resident Superior Court judge in North Carolina because of the voting customs, practice and procedures complained of herein. The custom or practice of state-wide election of resident Superior Court judge has

been imposed and maintained by the defendants and their predecessors in office for the purpose and with the effect of consistently degrading the influence of Republican Voters on the political process as a whole.

35. Arthur S. Beckhan, Jr., was a registered Republican Voter in the 22nd Judicial District. In 1968, he was the Republican candidate for resident Superior Court judge for the 22nd Judicial District. In that election, he received a state-wide total of 597,234 votes and his Democratic opponent received a total of 763,487 votes. In the 22nd Judicial District, however, Beckham received 38,823 votes and his Democratic opponent received only 33,138 votes. But for the requrement of statewide election of resident Superior Court judges imposed by the defendants or their predecessors in office, Beckham would have been elected.

36. The terms of regular Superior Court judges have been so established so that the dates for their elections primarily occur in non-Presidential election years. For example, in 1982, 27 Superior Court judges were up for election and in 1986, 22 were up for election. In contrast, in 1980, only 8 were up for election and, in 1984, only 8 were up for election. The terms for resident Superior Court judges have been so established for the purpose and with the effect of consistently degrading the influence of Republican Voters on the political process as a whole.

37. In North Carolina, the General Assembly has been consistently and overwhelmingly controlled by Democrats in numbers far in excess of the proportionate voting strength of Democratic voters. Through the gerrymandering of legislative district lines and other voting customs, practices and procedures such as (1) large multimember districts with little or no community of

interest other than a preponderance of Democratic voters and the submergence of Republican Voters therein, (2) numbered seats, (3) ballot counting rules which, until recently, canceled crossover votes, (4) manipulation of tax checkoff campaign funds, (5) ballot position rules, (6) closed primary rules, (7) runoff primaries, (8) anti-single shot voting rules, (9) rotation agreements and (10) mal-apportionment of state resources, the votes of Republican Voters have been persistently degraded and diluted in the election of members of the General Assembly and the influence of Republican Voters on the political process as a whole has been and is consistently degraded. The consistent and overwhelming control of the General Assembly by Democrats far in disproportion to Democratic voting strength is evidence that the electoral system is arranged in such a manner that will consistently degrade the influence of Republican Voters on the political process as a whole.

38. In the General Assembly, Republican members are discriminated against and humiliated by customs and practices imposed by the overwhelming Democratic majority such as (1) being segregated in the rear of the Assembly chambers as racial minorities were on public transportation and places of public assembly in the past, (2) having their proposed laws receive no fair or impartial consideration, (3) having their proposed laws substituted by substantially identical proposed laws with Democratic sponsors, (4) being denied seats on committees in proportion to their relative strength in the General Assembly, (5) being denied any influence in the selection or appointment of legislative staff and, (6) being denied the same level of legislative services enjoyed by Democrats. These specific items of discrimination and humiliation are evidence that the electoral system is arranged in such a

manner that will consistently degrade the influence of Republican Voters on the political process as a whole.

39. In North Carolina, the Governor has no veto power and is unable to operate as a constitutional check or balance on the unbridled power of the overwhelming control of the General Assembly by Democrats. Despite the fact that opinion polls indicate that a majority of all voters in North Carolina favor the gubernatorial veto, the General Assembly persistently refuses to adopt a constitutional amendment providing for the veto and even refuses to allow a referendum on the issue. The refusal of the Democratic General Assembly to adopt the gubernatorial veto or to allow a referendum on the issue is evidence that the electoral system is arranged in such a manner that will consistently degrade the influence of Republican voters on the political process as a whole.

40. When the Governor is a Republican, which has occurred only twice in this century, the Democratic controlled General Assembly regularly and consistently passes laws which deprive the Governor of his historic and traditional powers, even to the point of depriving him of his power to name his own legal counsel when he challenges the same, and other arbitrary, capricious and unconstitutional legislation; instead, the General Assembly imposes upon him the legal representation of the Attorney General who is a Democrat and who controls litigation in a manner contrary to the desires and policies of the Governor. Similarly, Chapter 509 abolished the position of Special Superior Court Judge, which positions were filled by appointment by the Governor, effective December 31, 1988, and even sought to deprive the Governor of his appointive power until that date by purporting to continue in office the Democrats whose terms were due to expire on June 30, 1987. The deprivation of the Governor's historic

and traditional powers when he is a Republican is evidence that the electoral system is arranged in such a manner that will consistently degrade the influence of Republican Voters on the political process as a whole.

41. The North Carolina congressional delegation has been consistently and overwhelmingly controlled by Democrats in numbers far in excess of the proportionate voting strength of Democratic voters, through the gerrymandering of congressional district lines which, for example, include in such districts counties with little community of interest, exclude from such districts counties which have communities of interest, shift counties in and out of districts to reduce the name recognition value of incumbent Republicans and other similar devices. Such gerrymandering is possible because of the consistent and overwhelming control of the General Assembly by Democrats and the lack of the gubernatorial veto. The consistent and overwhelming control of the congressional delegation by Democrats far in excess of the proportionate voting strength of voters is evidence that the electoral system is arranged in such a manner that will consistently degrade the influence of Republican Voters on the political process as a whole.

42. The State of North Carolina has no strong policy favoring statewide election of resident Superior Court judges. In fact, statewide election chills the desire of Republicans to be candidates for resident Superior Court judge and the ability of Plaintiff NCGOP to recruit candidates for resident Superior Court judge. In the 1984 and 1986 general elections, for example, of 40 resident Superior Court judgeships up for election, only 4 were contested. Since 1968, of 181 resident Superior Court judgeships up for election, only 10 have been contested. As a result,

statewide election of resident Superior Court judges chills public debate on issues of public importance.

43. The North Carolina Code of Judicial Ethics prohibits candidates for resident Superior Court judge from discussing their views on disputed legal or political issues, such as their views regarding the death penalty or other issues of public importance. As a result, contested races, when they occur, are entirely controlled by the party voting preference and habit of the electors statewide. Thus, the overwhelming statewide registration advantage enjoyed by the Democratic party guarantees the election of the Democratic candidate, and in the context of the Code of Judicial Ethics, chills public debate on issues of public importance.

44. The carefully created structure of statewide election coupled with the prohibitions on effective campaigning imposed by the Code of Judicial Ethics also chills the ability of Republican candidates to raise campaign funds in order to promote name recognition and thereby ameliorate and overcome the statewide Democratic registration advantage.

45. As a result of all the foregoing factors, only a very small number of voters, if any, have any knowledge about the candidates for resident Superior Court judge outside the Judicial District in which a particular voter resides. Predictably, the above pled factors and the lack of voter knowledge chill all voters in the exercise of the electoral franchise and result in a marked decrease in the percentage of voters who bother to vote in the judicial races. For example, in the 1984 general election, a total of 2,226,727 voters voted in the election for Governor but on 1,886,020 voters voted in the contested election for resident Superior Court judge for the 24th Judicial District and only 1,945,656 voters voted in the contested election

for resident Superior Court judge for the 2nd Judicial District. Similarly, in the 1986 general election, a total of 1,591,330 voters voted in the election for U.S. Senator but only 1,400,751 voters voted in the contested election for resident Superior Court judge for the 2nd Judicial District. Thus, the voting customs, practice and procedures complained of herein chill public debate on issues of public importance and chill the exercise of the electoral franchise.

VIOLATIONS

46. The adoption and maintenance of statewide election of resident Superior Court judges was and is intended consistently to degrade, and has the effect of consistently degrading, the influence of Republican Voters on the political process as a whole. Statewide election of resident Superior Court judges is a voting custom, practice or procedure which is part of a complete electoral system which is arranged in a manner that is intended consistently to degrade, and has the effect of consistently degrading, the influence of Republican Voters on the political process as a whole.

47. The custom, practice or procedure of requiring that candidates for resident Superior Court judge run for specific judgeships ("numbered posts") instead of running at-large for all judgeships up for election in a given year has no authority in law and is contrary to the provisions of N.C.G.S. §163-1(a) and (b). The adoption and maintenance of numbered posts was and is intended consistently to degrade, and has the effect of consistently degrading, the influence of Republican Voters on the political process as a whole. Numbered posts is a voting custom, practice or procedure which is part of a complete electorial system which is arranged in a manner that is intended consistently to degrade, and has the effect of

consistently degrading, the influence of Republican Voters on the political process as a whole.

48. The use of district, rather than statewide, nomination for resident Superior Court judges has no authority in law and is contrary to the provisions of N.C.G.S. §163-1. The adoption and maintenance of district nomination was and is an integral part of the "numbered post" system and was and is intended consistently to degrade, and has the effect of consistently degrading, the influence of Republican Voters on the political process as a whole. District nomination of resident Superior Court judges is a voting custom, practice and procedure which is part of a complete electoral system which is arranged in a manner that is intended consistently to degrade, and has the effect of consistently degrading, the influence of Republican Voters on the political process as a whole.

49. The requirement that a candidate for resident Superior Court Judge must reside in the Judicial District for which he seeks election before he can file a notice of candidacy is a voting custom, practice and procedure which, by itself and as a part of a complete electoral system, is arranged in a manner that is intended consistently to degrade, and has the effect of consistently degrading, the influence of Republican Voters on the political process as a whole.

50. The voting customs, practices and procedures complained of herein, alone and in combination with the other facts alleged herein, are intended to and result in the overwhelming predictability of the success of Democratic candidates for resident Superior Court judge over Republican candidates and were and are intended to and did and do constitute structural dilution of the voting franchise

of Republican Voters in violation of the Fourteenth Amendment to the United States Constitution.

51. The voting customs, practices and procedures complained of herein, alone and in combination with the other facts alleged herein, are intended to and restrict the free exercise of the fundamental rights of free speech and association in violation of the First Amendment to the United States Constitution.

RELIEF

Wherefore Plaintiffs pray for:

1. A declaration that the voting customs, practices and procedures complained of herein constitute unlawful structural dilution of the voting franchise of Republican Voters and an unlawful restriction of their fundamental rights of freedom of speech and association.

2. A preliminary and permanent injunction prohibiting the defendants from conducting elections for resident Superior Court judge under the existing system and an order that such elections be conducted by judicial district (without a candidacy residency requirement) for both nomination and election in such a manner as does not unlawfully discriminate against Republican candidates and Voters.

3. The costs of this action, including reasonable attorneys' fees.

4. Such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

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No. 92-2046

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JAMES B. HUNT, JR., GOVERNOR OF NORTH CAROLINA, *et al.*,

Petitioners,

v.

REPUBLICAN PARTY OF NORTH CAROLINA, *et al,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF RESPONDENT NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Respondent North Carolina Association of Black Lawyers (NCABL) was an intervenor-defendant in the courts below. Thus, if this Court were to grant the petition for a writ of certiorari NCABL would support the position of the petitioners on the merits: North Carolina's unique system of electing trial court judges does not violate the fourteenth amendment's prohibition of politically partisan gerrymandering. However, for the reasons set out herein, NCABL urges that the present petition be denied.

NCABL is firmly of the opinion that the district court correctly dismissed the complaint. Since the complaint was dismissed, however, the record is devoid of facts that would illuminate the claims made by the plaintiffs or substantiate the state's defense, including the reasons that support North Carolina's retention of its unique method for electing trial judges. Further, NCABL intervened in the litigation in order to defend a system that has already been upheld as not violating the equal protection clause (*Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *aff. mem.*, 409 U.S. 807 (1972) and to demonstrate that a shift to district rather than state-wide election of judges would be regressive in terms of the ability of African American voters to elect candidates of their choice.

NCABL believes that the case should be disposed of through the grant of summary judgment in favor of defendants. Nevertheless, because of the complexity of the factual issues raised by the case, respondent is of the view that the Court's eventual consideration of the legal issues would be greatly aided by a fully developed record.

Finally, because of the uniqueness of North Carolina's system for electing trial court judges — no other state uses a similar system — this petition raises no questions of national importance. A decision on the merits by the courts below will greatly assist the Court in deciding whether the case warrants review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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